Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DFW Airport – like most airports – enters into bargained-for, comprehensive "use agreements" with airlines using its facilities. In exchange for long-term terminal leases, reduced lease rates, and fuel and landing-fee discounts, the signatory airlines agree to serve the Dallas/Fort Worth area exclusively from DFW. Under these facts:

- Does the Fifth Circuit's holding that the exclusivity provision in DFW's use agreement is preempted by the Airline Deregulation Act conflict with this Court's precedent providing that the ADA does not preempt voluntary, self-imposed contracts?

- Does one 38-word sentence in the 100-page use agreements, referring to the 1968 Bond Ordinance passed to finance DFW's construction, convert those agreements into an attempt at local regulation of air service, thereby preempting the exclusivity provision under the Airline Deregulation Act?

2. The Fifth Circuit upheld DOT's interpretation that the Wright Amendment's commuter airlines exception allows single-ticket service from Love Field to points beyond the Love Field Service Area, *if* a first leg is flown intrastate on a 56-seat aircraft that then connects at a Texas airport for a second-leg, interstate flight. Does the Fifth Circuit's holding conflict with the D.C. Circuit's view that Congress intended to keep Love Field a short-haul airport?

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CROSS-PETITION FOR A WRIT OF CERTIORARI

The Dallas-Fort Worth International Airport Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported, but is reproduced at Appendix A to the Petition for Writ of Certiorari previously filed by the City of Fort Worth. (FW Pet.App. 1). The declaratory and procedural opinions of the United States Department of Transportation are unreported, but are reproduced at Appendices B (FW Pet.App. 53) and C (FW Pet.App. 147), respectively, to Fort Worth's Petition for a Writ of Certiorari.

JURISDICTION

The Fifth Circuit Court of Appeals entered its judgment on February 1, 2000, and issued a revised opinion on February 24, 2000 (FW Pet.App. 1). No petition for rehearing has been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Airline Deregulation Act. The pertinent portions of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b), provide:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

The Wright Amendment. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29 (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft

with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The Shelby Amendment. Sections 337(a) and (b) of the Department of Transportation and Related Agencies

Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

STATEMENT OF THE CASE

This case will shape the future of DFW Airport – currently the world's fifth busiest airport. If the Department of Transportation's orders are upheld, then a linchpin term of DFW Airport's use agreements – the contracts negotiated between an airport and the airlines using its facilities – may be ignored on the pretext that the agreement acts as a local law regulating air commerce and is therefore subject to preemption by federal law.

The signatory airlines that enter use agreements with DFW Airport receive substantial benefits over the other non-signing airlines that use DFW; DFW, in turn, receives

as consideration the airline's pledge to serve the Dallas-Fort Worth area exclusively from DFW – a not insubstantial promise when millions of dollars of bonds to finance airport expansion are involved. DFW relies on fees paid by its signatory airlines – which have pledged to use DFW's facilities exclusively – to pay for the DFW's costs of operation and debt service.

The DOT's orders that were affirmed by the Fifth Circuit wrongly remove from the contractual equation the commitment to concentrate an airline's services at DFW. DOT views the airport's acceptance of this bargained-for promise as an improper local regulation of an airline's affairs. Can DFW and other United States airports rely – like any other party to a contract – on the promises willingly made by its air carriers in a privately ordered agreement?

DFW Airport is also under assault by the DOT's new interpretation of some of the original protections of the 1979 Wright Amendment that were previously upheld by the D.C. Circuit in a 1988 opinion.[1] The Department's new-found interpretation essentially rewrites the Wright Amendment to sanction so-called "through service," which opens Love Field to single-ticket interstate service far beyond the limits originally intended and set by Congress. To borrow a phrase from Continental Airline's advertisement, if DOT's interpretation is adopted, Love Field is now opened "to the World."

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[1] *Continental Airlines, Inc. v. DOT*, 843 F.2d 1444, 1454 (D.C. Cir. 1988).

I. The Federal Nudge.

For almost as long as there has been commercial air traffic, the cities of Dallas and Fort Worth have fought the contemporary equivalent of a prairie war. Dallas' Love Field was a mere 12 miles to the east of Fort Worth's Greater Southwest International Airport – a proximity that produced "unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities."[2] In 1961 the federal government undertook to remedy the situation with what courts have called "more than a gentle nudge."[3]

By 1964, the Civil Aeronautics Board concluded that "service to Dallas and Fort Worth should be required through a single airport which meets . . . the present and future requirements for trans-continental cargo and passenger services."[4] The CAB gave the parties 180 days to arrive at a "voluntary agreement" regarding "the *location* of the airport to be used for the consolidated service. . . . "[5] When disagreement persisted, CAB

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[2] *City of Dallas v. Southwest Airlines*, 371 F.Supp. 1015, 1019 (N.D. Tex. 1973), aff'd on other grounds, 494 F.2d 773 (5th Cir. 1974).

[3] *City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d 496, 497 (Tex. App. – Dallas 1987, writ denied).

[4] Initial Decision of Judge Katherine A. Kent, Part II, 81 C.A.B. 798, 816, 1979 WL 21406-16 (1979). Cross-Pet.App. at 57 Judge Kent's decision provides a thorough discussion of the background of this controversy, including the development of DFW Airport, and the legislative history and purpose of the Wright Amendment [Cross-Pet.App. at 51-101].

[5] *Id.* (emphasis added).

determined that it should "assist" the Cities in reaching their voluntary agreement.[6]

The cities were finally pushed to agreement by the fall of 1968, and enacted the 1968 Regional Airport Concurrent Bond Ordinance to finance construction of DFW.[7] Essentially the two arch-rivals agreed to adopt " 'covenants against competition' in which each agreed, in pursuance of their common purpose, to put aside plans to compete with each other by promoting scheduled service at their solely-owned municipal airports. . . . "[8]

The Cities acknowledged in Section 9.5A of the 1968 Bond Ordinance that Love Field, as well as the other area airports, was "potentially competitive" with DFW.[9] The Cities thus agreed in Section 9.5 to phase out Certificated Air Carrier passenger service (an industry term signifying, in this context, interstate service) from their respective local airports, to transfer those services to DFW Airport, and to refrain from any future acts or policies that would be "competitive with or in opposition to the optimum use and development of [DFW Airport]."[10]

In early 1970, the eight CAB-certified (that is, interstate) air carriers then serving the Dallas-Fort Worth area executed Letters of Agreement with the DFW Regional Board. Each signatory airline agreed to "move all of its Certificated Air Carrier Services serving the Dallas-Fort Worth area to the [DFW Airport] . . . to the extent

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[6] *Id.* at Cross-Pet.App. 58.

[7] FW Pet.App. 58-60.

[8] *Kent Decision* at Cross-Pet.App. 61.

[9] FW Pet.App. 59.

[10] *Id.*

required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance."[11] Identical language was included in subsequent Use Agreements signed by each of those airlines, and at midnight on January 13, 1974 – more than twelve years after CAB's nudge began – the major air carriers moved to DFW.[12] Fort Worth immediately closed GSIA, but Love Field remained open.[13]

II. The Love Field Legislation.

Southwest Airlines refused to leave Love Field when the major carriers relocated to DFW Airport. Because Southwest offered only intrastate services, it was exempt from federal laws governing interstate airline operation and thereby avoided inclusion under section 9.5A of the 1968 Bond Ordinance.[14]

When Congress passed the Airline Deregulation Act in 1978, Southwest obtained authority (under an unusual, but short-lived provision of the new law) to start service between New Orleans and Love Field.[15] At the specter of restored interstate service from Love Field and the revival of the hostilities between the prairie-warrior Cities,

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[11] *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. at 1020-21 & n.1.

[12] *See City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d at 498.

[13] *See City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 775 (5th Cir. 1974).

[14] *Id.* at 777. Southwest was regulated by the Texas Aeronautic Commission, but not as a CAB-certified carrier.

[15] *See Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991) (discussing history of Wright Amendment).

House Speaker Jim Wright introduced legislation prohibiting *all* interstate service at Love Field.

Without a comparable Senate bill, the Conference Committee recommended a compromise to which, as the Fifth Circuit has observed, Southwest Airlines, Fort Worth, Dallas, DFW and all related constituent groups agreed.[16] It was that compromise agreement that was embodied in the Wright Amendment, as ultimately enacted.[17] The Wright Amendment was intended as a "fair and equitable settlement" to implement the agreement between Fort Worth and Dallas by "reducing interstate travel from Love Field," as necessary to benefit the region's travelers.[18]

The Wright Amendment[19] prohibited the CAB (and any successor agency) from issuing a certificate to an airline for interstate air service to or from Love Field, except for flights between Love Field and points in the four states contiguous to Texas on a "turn-around" basis only; the CAB could not allow carriers to advertise or sell through service on a single ticket between Love Field and points beyond those contiguous states. The Wright Amendment contained two other exceptions: (1) charter flights not to exceed ten flights per month; and, (2) "commuter airlines" operating aircraft with a capacity of 56 seats or fewer.

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[16] *See Cramer*, 931 F.2d at 1034.

[17] *Id.* at 1023.

[18] *Id.* at 1034.

[19] Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980).

The "Shelby Amendment" was passed in 1997 (as a rider to an appropriations bill) adding three more states to the four-state perimeter: Kansas, Mississippi and Alabama. That measure also amended the commuter airline exception to include aircraft weighing less than 300,000 pounds that are "reconfigured" to accommodate 56 or fewer passengers.[20]

III. The Proceedings Below.

In October 1997, Fort Worth sued Dallas, DFW Airport, and Legend Airlines in Texas state court asking for a declaration that the 1968 Bond Ordinance obligated Dallas to continue to restrict interstate air service at Love Field to short-haul service within Texas and the four contiguous states.

Continental Airlines, Inc., and its wholly-owned subsidiary Continental Express, Inc. (collectively "Continental") then demonstrated the need for more than declaratory relief by announcing their joint plans for nonstop service from Love Field to Cleveland, advertising flights from "Love to the World."[21] Fort Worth and DFW added Continental to the litigation. DFW sued Continental for a determination that its use agreement with "Continental Airlines" obligated Continental to provide all interstate services for the Dallas-Fort Worth area from DFW.

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[20] Section 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997).

[21] FW Pet.App. 48.

The Department of Transportation watched from the sidelines for almost a year as the state litigation progressed. On August 25, 1998 – at the urging of Legend Airlines and Continental – DOT observed that the litigation was proceeding without benefit of its views and instituted its own Interpretation Proceeding for the professed purpose of "helping" the parties resolve the pending litigation.[22]

By October 1998, the Texas state court heard motions for summary judgment and, on December 16, entered final judgment concluding that Dallas was obligated to prohibit interstate passenger service to or from Love Field to points beyond the four contiguous states. Legend, Continental and Dallas appealed the final judgment to the intermediate state appellate court. The Texas intermediate appellate court stayed its review of the state-court judgment pending the Fifth Circuit's decision, but has now lifted its stay.

Six days after the state court entered final judgment, the Department issued its Declaratory Order, making rulings (on what it called the "federal law issues") that were directly contrary to the state court's rulings on essentially the same issues.[23]

DFW Airport and the City of Fort Worth petitioned the Fifth Circuit under 49 U.S.C. § 46110 to review all of DOT'S findings, while other parties (including Southwest Airlines, which was not a party to the state court litigation) sought review of a portion of the DOT order. The Fifth Circuit issued its opinion denying the petitions for

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[22] FW Pet.App. 8, 16 n.5.

[23] FW Pet.App. 8-9, 16 n.5, 53.

review and affirming DOT's order on February 1, 2000, and issued a revised opinion on February 24, 2000.

The City of Fort Worth filed its Petition for a Writ of Certiorari on March 3, 2000, and DFW Airport now files its cross-petition.

REASONS FOR GRANTING THE WRIT

DFW Airport's writ should be granted for three reasons, the first two of which are interrelated and will thus be discussed together:

Reason One: **The Fifth Circuit's decision conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*.**

Reason Two: **Every major airport in the United States must know whether bargained-for provisions in their existing use agreements affecting airlines' services bind the air carriers using its facilities.**

With very few exceptions, every airport in the United States requires contracts – commonly called use agreements – with airlines using its runways, gates, and other facilities. Use agreements are obviously not state laws subject to federal preemption, but instead are arms-length business transactions voluntarily made, and from which both parties receive substantial benefits – including, in the case of the signatory airlines at DFW Airport,

long-term terminal leases, reduced lease rates, fuel discounts, and landing-fee discounts.[24] Among its contractual benefits, DFW receives the signatory airline's agreement to serve the Dallas-Fort Worth area exclusively from DFW.[25]

The holding in *Wolens*

The Department of Transportation reads the use-agreement provision that restricts a signatory airline from using another airport to serve the same metropolitan area as a local *regulation* "related to a price, route, or service of an air carrier," something prohibited by the express-preemption provisions of the ADA.[26] The Fifth Circuit agreed. But, the Fifth Circuit's concurrence with DOT's view directly conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*[27] and calls into question the bargained-for provisions regarding airline services in use agreements made by major airports throughout the nation.

This Court concluded in *Wolens* that voluntary, self-imposed contracts are not preempted by the ADA. While acknowledging that breach-of-contract claims against American Airlines (based on alleged problems with its frequent-flyer program) affected "rates, routes and services," this Court found against federal preemption because the terms of a contract are "privately ordered

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[24] *See* FW Pet.App. 139; Cross-Pet.App. 1-8.

[25] Cross-Pet.App. 9.

[26] 49 U.S.C. § 41713(b)(1).

[27] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).

obligations," and are not essentially the same as a state's "enact[ment] or enforce[ment] of any law, rule, regulation or other provision having the force and effect of law."[28]

Relying on basic tenets of contract law, this Court concluded that it could:

> not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.[29]

The "state" as a contracting party

The Fifth Circuit summarily dismissed DFW's invocation of *Wolens* with a footnote, suggesting that *Wolens* is distinguishable because neither of the contracting parties there was "a state" – presumably a reference to the quasi-governmental DFW Airport Board. Notably, the Fifth Circuit provided no authority for its conclusory dismissal of *Wolens*. Moreover, no logical or legal distinction – and certainly nothing in the *Wolens* opinion itself – suggests that an airline's self-imposed obligations made to a governmental entity are less worthy of enforcement than those made to a private person or business. The bedrock principles of contract law that this Court called upon in *Wolens* should apply equally to all parties to a contract, whether those parties are public, private, or both.

Indeed, there are other well-reasoned decisions – consistent with *Wolens* – where one of the contracting

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[28] *Id.*

[29] *Id.*

parties was, in fact, a governmental entity.[30] In *Associated General Contractors v. Metropolitan Water District*,[31] a California regional water authority negotiated project labor agreements ("PLAs") with various unions representing contractors hired to work on a water improvement project. A clause in the PLAs required that all contractors working on the project participate in certain designated employee-benefit funds.[32]

Holding that the PLAs were not state "laws" subject to ERISA preemption but "mere[ly] negotiated contract provisions demanded [by the state] for certain projects," the Ninth Circuit first observed that ERISA's definition of "state laws" excludes state action that lacks the effect of law. As a result, ERISA, "does not preempt state law which relates to an ERISA plan so long as the state action does not have the effect of law."[33] The distinction drawn by the Ninth Circuit is thus an eminently reasonable one: "Where the state merely acts as any private party might act, instead of in areas where it exercises lawmaking or law enforcement authority, ERISA preemption does not come into play."[34]

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[30] *See Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) ("[w]hen we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone. . . . A state does not regulate, however, simply by acting within [that zone].").

[31] 159 F.3d 1178 (9th Cir. 1998).

[32] *Id.* at 1179-1180.

[33] *Id.* at 1182 (quoting *Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis*, 825 F.Supp. 238, 245 (D. Minn. 1993)) (emphasis added).

[34] *Id.*

If this distinction is recognized in the ERISA field, it applies even more pointedly to the Airline Deregulation Act. As this Court noted in *Wolens*, the ADA "contrasts markedly" with ERISA, which creates a comprehensive scheme of dispute resolution channeling disputes into federal court.[35] In contrast, when Congress deregulated the airline industry it expressed "no intention to establish, simultaneously, a new administrative process for DOT adjudication of contract disputes," nor did it intend to funnel contract disputes into federal courts.[36]

And this Court has also embraced the distinction between state "regulations" and permissible, nonregulatory activity in the context of the preemptive scope of the National Labor Relations Act.[37] In *Building & Construction Trades Council v. Associated Builders & Contractors*, the Court held that the labor compact in question was not a government "regulation," noting that though the NLRA preempts a state from "regulating within a protected zone," a state "does not regulate . . . simply by acting within" that protected zone.[38] The Court followed with a statement that squarely applies here: "When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines only apply to State regulation."[39]

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[35] 513 U.S. at 232.

[36] *Id.*

[37] 29 U.S.C. § 151 *et seq.*

[38] 507 U.S. 218, 226-227 (1993).

[39] *Id.*

This unremarkable principle was not newly minted in 1993, the year *Building & Construction Trades Council* was decided: "Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor."[40]

The same rationale fits here: the quasi-governmental DFW Airport Board, by entering into use agreements with airlines at DFW Airport, was simply "interacting with private participants in the marketplace."

The scope of the use agreements

Rather than squarely addressing *Wolens*, the Fifth Circuit employed – in a curious way – its own analytical method from *Cardinal Towing Auto Repair, Inc. v. City of Bedford*.[41] The court's reference to *Cardinal Towing* is not surprising because that opinion accurately recounts the rule that courts, when asked to review a local government contract for possible preemption, *should look to the scope of the contract* for the activity it covers to determine whether it is a permissible proprietary action or an impermissible attempt to regulate. But it *is* surprising that the Fifth Circuit would mention *Cardinal Towing* and then fail to heed its directive to review the scope of the DFW use agreements in their entirety.

Rather than seeing the 100-page use agreement for the exhaustively comprehensive agreement that it is, the

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[40] *Id.*

[41] 180 F.3d 686 (5th Cir. 1999).

Fifth Circuit narrowly focused on a single sentence in the agreement in summarily concluding that the contracts "were enacted to effect the [1968 Bond] Ordinance." For such a leap, the Court looked solely to the presence in the use agreement of the following 38-word sentence:

> Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.[42]

A single reference to the 1968 Bond Ordinance in this one sentence of a densely detailed contract cannot and does not convert DFW's use agreement to an act of government regulation. Merely referencing an ordinance in a contract does not render the contract and the ordinance co-extensive – it simply makes the language of the ordinance one out of many contract terms. If properly examined in the way prescribed by *Cardinal Towing*, the use agreements are exponentially more than a mere overlap of the 1968 Bond Ordinance.

The Fifth Circuit, like the Department, latched on to the mistaken notion that if the Bond Ordinance provisions are preempted, then Section 3.2 of the agreement (quoted above) must automatically be preempted as well. But, parties routinely use portions of a statute to define their relationship without bringing the full weight of the statute into the bargain.[43] When a contract refers to or defines certain obligations that are described in a law –

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[42] FW Pet.App. 9.

[43] *Craddock Internat'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1107-08 (5th Cir. 1997).

like the reference to the terms of the 1968 Bond Ordinance – the text of the statute does become part of the agreement.[44] The law or ordinance "does not have 'statute rank'; rather, it is merely a part of the contract, a term like any other."[45] Only the statutory terms apply, not judicial determinations of the statute's validity or application.[46] Thus even if the Bond Ordinance itself is preempted (a point DFW does not concede), the mere reference to the ordinance does not cause preemption of the use agreement between DFW and the signatory airline.

This case gave the Fifth Circuit an opportunity to apply a *Cardinal Towing* analysis to the scope of DFW's use agreements. Failing to do so led to the wrong conclusion that the contracts were an exercise in regulation, which led inexorably to the equally wrong notion that the use agreement is not a "privately ordered obligation." The result is a Fifth Circuit opinion – on a far-reaching issue of nationwide importance – that is the polar opposite of this Court's holding in *Wolens*.

By adopting the DOT's findings, the Fifth Circuit has made it difficult, if not impossible, for airports and the airlines using them to craft nonregulatory, proprietary

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[44] *Overton v. City of Houston*, 564 S.W.2d 400, 403 (Tex. Civ. App. – Houston [1st Dist.] 1978, writ ref'd n.r.e.).

[45] *Craddock*, 116 F.3d at 1107 (quoting *Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico*, 607 F.2d 322, 325 (4th Cir. 1979)) (reversing trial court's interpretation that incorporation of statute "activated" statute – once incorporated, it is a term like any other); *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277, 1280 (5th Cir. 1982) (same).

[46] *See Craddock*, 116 F.3d at 1107.

contracts reflecting the circumstances unique to an airport such as DFW. Though an agency's interpretation may in the appropriate case be entitled to some deference, that deference cannot extend to a wholesale dismantling of arms-length transactions.

DFW Airport now faces the unsettling prospect of having an essential provision in its use agreements nullified – a bad enough prospect in the ordinary scheme of things, but one made far worse by its having been imposed on DFW by an agency and a circuit court that have flatly misinterpreted governing law. If the Fifth Circuit's decision stands, airports might just as well ask the DOT to write their contracts for them – by federal fiat.

Reason Three: Because of the conflict between the Fifth Circuit's and the D.C. Circuit's interpretation of the Wright Amendment, this Court should provide a definitive interpretation of the Amendment's "through-ticketing" provisions that is reasonable and consistent with Congress' intent to maintain Love Field as a short-haul facility.

The Wright Amendment forbids DOT from authorizing the advertising and sale of flights between Love Field and any point outside Texas. Two key exceptions to this general prohibition are now relevant.

- commuter airlines with aircraft seating fewer than 57 passengers – subsection (a)(2)
- flights to the four states contiguous to Texas – subsection (c)

The loophole repaired

The exception in subsection (c) that permits service to the four contiguous states (expanded by the Shelby Amendment to include three more states) has a caveat that closes an obvious loophole. Subsection (c) permits flights with any size aircraft – as long as (as pertinent here) "such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such state."

Without this so-called through-service or through-ticketing prohibition a passenger could board a full-size aircraft at Love Field and fly through, on one ticket, to any destination – U.S. or worldwide – merely by making a brief stop in one of the specified perimeter states. With through service on one ticket, Love Field would have remained a long-haul service airport essentially indistinguishable from DFW – the regional airport mandated by CAB.

The Department's view: the exception swallows the rule

Consistent with what the statute says, DOT ruled, in its 1985 *Love Field Amendment Proceeding*, that an air carrier may not advertise or sell service from Love Field to any destination beyond the contiguous-states perimeter. Relying on the Wright Amendment Conference Report, DOT told Continental Airlines (which like all airlines in 1985 possessed no regional jets with fewer than 57 seats) that it could not "evade" the restrictions of the Wright Amendment by:

> providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the

> five state area . . . [I]n our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate service from Love Field . . . however, the carrier cannot offer, promote or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.[47]

In upholding the DOT's interpretation of the Wright Amendment, the D.C. Circuit found in *Continental Air Lines v. Department of Transportation* that the " . . . DOT's interpretation is consistent with the purpose of the Amendment to limit Love Field to short-haul service."[48]

Ten years later, in September, 1998, however, Continental Airlines did precisely what the D.C. Circuit said it could not do, by advertising and offering service from "Love Field to the World" with "more than 190 destinations [in] 38 countries."[49] The only difference from 10 years earlier is the size of the plane on the *first segment* of the through flight – the second, long-haul leg was and is still flown on a large jet. Under its plan, Continental would operate short-haul flights with small, regional jets to its Houston hub where its passengers would then connect with larger jets – also operated by Continental – for flights to other U.S. cities, many of which are beyond the contiguous-state perimeter. Continental's new scheme

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[47] *Love Field Amendment Proceeding*, DOT Order 85-12-81, 1985 WL 57886 (1965). Cross-Pet.App. 10-21.

[48] 843 F.2d 1444, 1454-55 (D.C. Cir. 1988).

[49] *Id.* at Cross-Pet.App. 19-20.

was hardly the short-haul service contemplated by the Wright Amendment.[50]

Flatly contrary to its 1985 ruling, DOT now sanctions Continental's long-haul through service, deciding that:

> "any airline may offer through service between Love Field and another point to passengers using a flight between Love Field and another point within Texas operated under" the commuter airlines exception in subsection (a) of the Wright Amendment.[51]

DOT's new interpretation is based on the mistaken idea that the commuter-airline exception exempts planes with a passenger capacity of fewer than 57 seats from *all* restrictions of the Wright Amendment, including the through-ticketing prohibitions in subsection (c)(2). DOT reasons that because there is an express restriction on through service on large jets, but no similar restriction on commuter planes, Congress must have intended "to permit small aircraft to fly without such a restriction."[52]

DOT's interpretation necessarily assumes that Congress acted irrationally. Why would Congress have crafted a restriction on through service on large jets and simultaneously leave a loophole where through service

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[50] *See generally Continental Airlines, Inc. v. DOT*, 843 F.2d 1444, 1454 (D.C. Cir. 1988) ("[t]he range of aircraft with such small passenger capacity is limited and thus the exception will not undermine Love Field's status as a short – haul service airport."); 124 Cong. Rec. 30,670 (1978); H.R. Conf. Rep. No. 96-716 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78. *Kent decision* at Cross-Pet.App. 77 *et seq.*

[51] FW Pet.App. 146.

[52] FW Pet.App. 50.

could be easily accomplished by using a smaller plane for the first leg of a through flight to an interstate destination beyond the perimeter states?

The Fifth Circuit accepted DOT's strained reasoning under the *Chevron* doctrine,[53] disregarding the obvious conflict with the D.C. Circuit's interpretation of the Wright Amendment in *Continental*. Such an unwarranted reading cuts decisively against Congressional intent to keep Love Field short-haul, which was the foundation for the D.C. Circuit's affirmance of the DOT's 1985 interpretation.

To see the sophistry in DOT's interpretation, consider a passenger in New York City preparing to travel to Dallas Love Field under this "reinterpreted" Wright Amendment. That traveler will board a large jet in New York and travel on that aircraft over the long-haul segment to Houston, where he will then board a regional jet for the short-haul segment to Love Field. To say that traveler was not offered and sold through service to Love Field in violation of subsection (c)(2) is to behold "the tail wagging the dog."

If sufficient reason exists to have a federal law preventing through ticketing from Love Field, then the same statute should apply regardless of aircraft size. To conclude otherwise, one must willfully contort the statute's plain and intended meaning: the restrictions on through service must apply unless the *entire* journey is on aircraft operating under the commuter airlines exception. It should certainly apply here, where the long-haul segment is on a large aircraft and only the short-haul leg is on a

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[53] FW Pet.App. 50-51.

regional jet operating under the commuter airline exception. Despite the plain wording of the statute, DOT would require Congress to "gild the lily" by explicitly incorporating the through ticketing restriction in the commuter airlines exception.

The Shelby Amendment

The Wright Amendment – refined now by the Shelby Amendment – provides for flights beyond the seven-state perimeter *only* with aircraft that will seat fewer than 57 passengers. Flights transporting larger numbers of passengers (that would otherwise operate at DFW) are restricted to the perimeter states. Nothing in the words or history of the Wright Amendment or the Shelby Amendment suggests that Love Field was to be opened to *full-size* jet service to points beyond the perimeter. The commuter-airlines exception still reflects the basic rule of the Wright Amendment upheld by the D.C. Circuit: long-haul interstate flights are prohibited from Love Field to maintain Love Field as a short-haul facility.

The Shelby Amendment did not alter Love Field's basic character. That Appropriations Bill rider did just two things: (1) added three more states to the large jet perimeter and (2) authorized reconfigured jets with fewer than 57 seats under the commuter airline exception; the Shelby Amendment did not reverse Congress' intent to maintain Love field as a short-haul facility, and it certainly did not alter the through ticketing restrictions in subsection (c)(2).

While Congress may have intended, by passing the Shelby Amendment, some expanded service from Love Field, it permits that service only with smaller 56-

passenger jets, thereby imposing a practical limit to commuter service. With this restriction, any new long-haul service from Love Field will have inherent limitations: fewer passengers, fewer locations, less efficiency. Had Congress wanted to remove these impediments to long-haul service, the Shelby Amendment could easily have gone further in its modifications to the Wright Amendment and permitted service with planes of greater passenger capacity. But it did not.

An illustrative flight

To fulfill its apparent intention to administratively rewrite the Wright Amendment to encourage long-haul Love Field service, the DOT must rewrite the commuter-airlines exception by impermissibly adding words. A currently available travel scenario demonstrates the DOT's new language: A Continental Airlines passenger can now fly from Love Field to La Guardia with a brief touchdown in Houston to collect other passengers bound for New York on a large jet.[54] Only the intrastate segment from Love Field to Houston is flown by a 56-seat regional jet; Continental's passenger who boarded at Love Field has not flown to La Guardia or to "any point outside of Texas" on a small-capacity plane, thereby satisfying the commuter-airlines exception.

Rather than using the commuter airline exception, our Love Field passenger actually gets to La Guardia by *both* categories of aircraft – commuter aircraft to Houston and a full-size jet for the long-haul segment. Therefore, DOT's new interpretation permitting through service

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[54] *See* FW App.Pet. at 141-142, n.29.

requires rewriting subsection (a) to prohibit all interstate service at Love Field except for service provided "*in whole or in part* on aircraft with a passenger capacity of 56 passengers or less."

DOT's new interpretation of the commuter-airlines exception expands long-haul service from Love Field far beyond where the Shelby Amendment drew the boundaries. Permitting regional jets to funnel passengers to an intrastate hub where they can be collected for a full-sized aircraft to complete long-haul, through service defeats the inherent limitations Congress imposed.

Through service from Love Field to La Guardia is prohibited *regardless* of whether the segment from Houston to La Guardia is fed by a single large aircraft from Love Field or a regional jet. The commuter-airline exception is not involved when the second segment of the Love Field – La Guardia service picks up in Houston: subsection (a) of the Wright Amendment addresses flights between Love Field and points outside Texas only when the service is provided exclusively by commuter airlines. The flight from Houston to La Guardia is on a full-size aircraft, not a 56-passenger jet.

Subsection (c) certainly applies to full-size aircraft and to through service on one ticket, but allows interstate service only to one of the perimeter states; subsection (c) does not apply to lucrative through service from Love Field to major hub airports or international markets via Houston. In short, there is no provision in the Wright Amendment for opening through ticketing from Love Field "to the World" – regardless of the size of the planes used on the first leg of the flight.

In sum, the DOT and Fifth Circuit views of the through ticketing prohibition are aggressively illogical and profoundly at odds with Congress' intent. The D.C. Circuit's view is radically different from what appears to be DOT's current agenda and the unmerited deference by the Fifth Circuit. The D.C. Circuit's interpretation is the correct one: the Wright Amendment was passed to limit Love Field to short-haul air service. This Court should resolve the conflict between the two circuits by recognizing that the D. C. Circuit offers the well-reasoned view that is consistent with the intent of Congress.

The Airport's dilemma

The Fifth Circuit leaves the fate of DFW Airport to the tender mercies of DOT, deferring to the agency's "strain[ed]" interpretation of the Wright Amendment and its expertise on "aviation-related" issues, while ignoring the compelling logic of the D.C. Circuit's *Continental* decision.[55] To this Court of last resort, DFW Airport pleads that its fate not be shaped by the agency that:

- dismantled a 30-year-old agreement between Dallas and Fort Worth that was made, at the insistence of the federal government, in order to build and maintain a single regional airport for the Dallas/Fort Worth area;
- nullified the contracts that major air carriers voluntarily made with DFW Airport; and
- overturned the original purpose of the Wright Amendment by sanctioning long-haul air service at Love Field.

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[55] FW Pet.App. 51-52.

DFW Airport's future should be decided by rational, rather than by strained, interpretations of the Wright Amendment.

CONCLUSION

The lifeblood of DFW Airport is its stable of air carriers and the use agreements that comprehensively define the business relationship between the airport and those carriers. The mere reference in the exclusivity provision of the use agreement to the 1968 Bond Ordinance does not negate that privately ordered obligation. This Court should correct the Fifth Circuit's judgment to make that principle clear and consistent with *Wolens*.

Moreover, if linchpin terms of airport use agreements are preempted by the Airline Deregulation Act on the pretext that they constitute local government regulation of "rates, routes and services" by requiring carriers serving a metropolitan area to use the contracting airport's facilities exclusively, then the future operations of major airports in this country will be disrupted.

This Court should also correct the Fifth Circuit's unmerited deference to DOT's *sub rosa* rewrite of the Wright Amendment despite the clear conflict between that rewrite and the D.C. Circuit's prior interpretation of the same provisions. With DOT's unreasonable and unreasoned interpretation, every passenger leaving Love Field "for the World" is one less passenger leaving DFW Airport – the regional airport mandated by the federal government whose agency's decisions now undermine it.

Respectfully submitted,

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APPENDIX

DALLAS/FORT WORTH INTERNATIONAL AIRPORT RESTATED USE AGREEMENT

OCTOBER 1995

THIS RESTATED USE AGREEMENT, made effective as of the 5th day of October, 1995, by and between the Dallas-Fort Worth International Airport Board, (hereinafter called the "Board"), being the duly and lawfully constituted and operating Board of Directors of the Dallas-Fort Worth International Airport (hereinafter called the "Airport"), belonging jointly to the Cities of Dallas and Fort Worth, Texas (hereinafter called "Cities"), and having an office at 3200 East Airfield Drive Dallas-Fort Worth Airport, Texas 75261, and Continental Airlines (hereinafter called "Airline"), a corporation of the State of Delaware, having its principal office at 2929 Allen Pkwy., Suite 1401; Houston, Texas 77019.

WITNESSETH:

WHEREAS, the Use Agreement dated January 1, 1974, has since been amended by an Initial Amendment, a Second Amendment, and a Third Amendment without having ever been restated to incorporate the Use Agreement, as amended, into a single document; and

WHEREAS, the parties desire to restate the Use Agreement, as amended, without hereby making further substantive changes thereto;

NOW THEREFORE, the parties hereto, in consideration of the mutual promises herein contained, do hereby execute, adopt and agree to the following Restatement of the Use Agreement, as amended:

ARTICLE I

DEFINITIONS, CONSTRUCTION

SECTION 1.1 DEFINITIONS.

In and throughout this agreement, the following words shall have the following meanings, respectively, to-wit:

(a) "AIRCRAFT OPERATOR" means (i) a person owning one or more aircraft which are not leased or chartered to any other person for operation, and (ii) a person to whom one or more aircraft are leased or chartered for operation – whether the aircraft so owned, leased or chartered are military or non-military or used for private business, pleasure or governmental business, or for carrier or non-carrier operations, or for scheduled or non-scheduled operations or otherwise. Such phrase shall not mean the pilot of an aircraft unless he is also the owner or lessee thereof or a person to whom it is chartered.

(a-1) "AIRCRAFT PARKING RAMP AREAS" means those areas (as shown on Exhibit D and labelled area "V") between (and not including) the Terminal Structures and the Aircraft Circulating Areas, and which are used for loading and unloading passengers, property and mail to and from aircraft, providing aircraft with fueling and

lubricants, performing ramp service operations, inspection, maintenance of aircraft as setforth [sic] in the rules and regulations of the Board and the parking of mobile equipment used in connection therewith.

(b) "AIRPORT" means the Dallas/Fort Worth International Airport situated in the counties of Dallas and Tarrant in the State of Texas, the boundaries of which, including the initial structures, facilities and improvements, are shown on Exhibit E, attached hereto and made a part hereof.

(c) "AIRPORT SERVICES" means the general administration and operation of the Airport by the Board, including, but not limited to the following functions by the Board at the airport, to-wit: Airport police, crash, rescue and fire protection, and traffic control; the acquisition of land beyond the initial boundaries of the Airport for use as a part of the Airport; clearing, grading and draining, the costs of which are not charged or chargeable in specific terms to users under other agreements; industrial wastes, roadway systems, perimeter fencing and utilities systems; the furnishings of communications systems, facilities and tunnels; landscaping; the construction equipment and maintenance of facilities on non-revenue producing land and the maintenance of such land itself, facilities and areas or subdivisions of the Airport necessary in the operation and maintenance thereof, including the Board's administration, maintenance, police, crash, rescue, fire and operations space and facilities.

(d) "AIRPORT SERVICES COMPONENT" means those costs and expenses as determined in accordance with Schedule A attached hereto and made a part hereof.

(e) "AIRPORT SERVICES COSTS" means and shall include the total of (i) the costs, expenses and liabilities of the Board in providing Airport Services, including the Board's operations and maintenance costs and liabilities, however arising, properly charged or chargeable on an accrual basis of accounting to Airport Services; plus (ii) 1.25 times the debt service requirements on any Bonds of the Airport (other than Special Facility Bonds) allocable or chargeable to Airport Services, which allocation or charge shall be in the proportion that the Contract Costs for the construction or development of Airport Services bears to the Contract Costs for the construction or development of those portions of the Airport which are not financed with private capital or Special Facility Bonds; and plus (iii) all other costs, expenses, or liabilities of the Board, however arising (except debt service on Bonds allocable or chargeable to Airport Services and except Professional Fees other than as provided in Section 5.4 hereof), not specifically charged or chargeable in specific terms to the users under other agreements relating to the use of the Airport or any part thereof or of its lands. It is expressly provided that the cost of the premiums of insurance required or permitted to be carried under Section 8.1(b) hereof shall be included in Airport Services Costs.

(f) "AIRTRANS SYSTEM" means the automated transit system being constructed and installed by the Board and shall include vehicles, trucks and other facilities and equipment providing a means of transporting persons, baggage, mail, materials, supplies and trash, to, from and between certain facilities and structures within the Passenger Enplaning and Deplaning complex.

(g) "ANCILLARY NET REVENUES" means that amount, either positive or negative, derived by subtracting Gross Revenues of the Board (except overdue payments collected pursuant to Section 13.2(b)(iii) hereof), other than Landing Fees, from Gross Expenses of the Board less Landing Fee Elements. As used herein, the phrase "Gross Expenses of the Board less Landing Fee Elements" means the total of (i) operations and maintenance costs of the Airport except those employed directly in the determination of Landing Fees and indirectly in the Airport Services Component allocated to Landing Fees hereunder; (ii) debt service requirement on all outstanding Bonds at 1.25 to 1.0 coverage except those dollar amounts of debt service employed directly in the determination of Landing fees and indirectly in the Airport Services Component allocated to Landing Fees hereunder; and (iii) all other obligations of the Board required to be paid from revenues of the Airport except the dollar amount of such obligations included in the Airport Services Component employed in the determination of Landing Fees hereunder.

(h) "BASE PERIOD" means the period from the Starting Date through the next succeeding 30th day of September, which is the closing day of the Fiscal year.

(i) "CAPITAL IMPROVEMENT FUND" means a certain fund established by the Cities pursuant to Section 7.4 of the 1968 Concurrent Bond Ordinance.

(j) "CERTIFICATED AIR CARRIER" means a person who conducts Certificated Air Carrier Services. Certificated Air Carrier Services means aircraft operations of

the following types when operating on a regular and continuing basis, to-wit:

(i) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;

(ii) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the civil Aeronautics Board or any successor agency thereto or by any other agency or department of the United States of America; and

(iii) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.

It is provided, however, that this term shall not include services provided by commercial "air taxi" operators meeting the requirements for exemption provided from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commission or by any other agency of the United States of America or the State of Texas having jurisdiction to provide such exemptions.

(k) "CONCESSIONAIRE" means a person having a lease, permit, contract or other fee arrangement with the Board entitling him to carry on a business at the Airport,

other than the business of transportation by aircraft, or to furnish materials to or to perform services for other persons at the Airport, other than transportation by aircraft at the Airport.

(l) "CONTRACT COSTS" means and shall include the Board's cost for the acquisition of land as provided in section 1.1(c) hereof, for labor and payments to contractors, suppliers and materialmen in connection with preparing, constructing and otherwise acquiring, replacing, extending and improving the Airport, and the costs, not covered by insurance, of restoring property damaged or destroyed in connection with construction.

(m) "CONSTRUCTION APPLICATION" means the Board's construction request form, a facsimile of such form being shown as Exhibit G, attached hereto and made a part hereof.

(n) "ENPLANED PASSENGERS" means all originating and on-line and off-line transfer passengers boarded at the Airport on Signatory Airlines' aircraft during the latest twelve (12) consecutive months for which such data are available.

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ARTICLE III

DURATION; CERTIFICATED AIR CARRIER SERVICES

SECTION 3.1 DURATION; SUSPENSION.

(a) This Agreement shall become effective upon execution and delivery hereof by the Board and by Airline, and the rights of use and occupancy granted herein shall commence on the Starting Date and subject to the other provisions hereof, this Agreement shall expire at midnight on December 31, 2009. Coincident with the effective date of this Agreement, the Letter agreement between the Board and Airline shall be suspended, except as recited in Section 3.1(b) hereof. Such suspension shall continue until the execution and delivery of agreement substantially similar to this Agreement between the Board and Air Canada, American Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Mexicana de Aviacion, Ozark Air Lines, Inc., Piedmont Aviation, Inc., and Texas International Airlines, Inc., individually, at which time the Letter Agreement between the board and Airline shall be cancelled in its entirety.

(b) During such period of suspension:

(i) The Letter Agreement between the Board and Airline shall be superseded by this Agreement in every respect, except that Paragraph C of the said Letter Agreement shall remain in effect until the said Letter Agreement has been cancelled pursuant to Section 3.1(a) hereof:

(ii) Section 5.1(a) and 5.9 hereof shall not be effective; and

(iii) Signatories to the Letter Agreement shall be considered Signatory Airlines under this Agreement for all purposes.

SECTION 3.2 CERTIFICATED AIR CARRIER SERVICES.

Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.

Order 85-12-81

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

[SERVED DEC 31 1985]

Issued by the Department of Transportation
on the 31st day of December, 1985

LOVE FIELD AMENDMENT PROCEEDING	:	Docket 43307

ORDER

By Order 85-7-65 (July 26, 1985), the Department requested comments on the interpretation of the Love Field Amendment (Amendment) (Sec. 29, International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35 (1980)), which restricts service by air carriers at Love Field, Texas.[1] Our request for comments followed announcement by Continental Airlines of its intention to commence service at Love Field and opposition of various persons to this service. On July 10, 1985,

[1] The question of proper interpretation of the Love Field Amendment was previously raised in the *Southwest Airlines – Muse Air Acquisition Proceeding*, where the Department found it unnecessary to reach the issue in its decision. Order 85-6-79 (June 24, 1985). We did, however, suggest that the issue should be resolved in another context. *Id.*

the Dallas/Fort Worth (DFW) Parties[2] submitted a letter to the Department's Office of Aviation Enforcement and Proceedings seeking an informal enforcement investigation and order prohibiting Continental's proposed service.

* * *

to bar air carriers who interline elsewhere on their systems from serving Love Field.

The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states. As a result, subclauses (1) and (2) are not properly read as class and operational restrictions, respectively. Rather, these subclauses simply specify interline and online restrictions applicable to service at Love Field.

Moreover, statements of Congressman Anderson of California and Senator Cannon of Nevada also support this interpretation of the Amendment. Each was a member of the Conference Committee, and each was the floor manager of the bill reported out of the Conference Committee. The views of Conference Committee members and floor managers are entitled to greater weight than that usually afforded the views of individual legislators, especially where such expressed views are consistent with other elements of the legislative history. *Train v. Colorado Public Interest Group*, 426 U.S. 1, 14 (1976). The DFW

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[2] The DFW Parties are the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth International Airport Board.

Parties and Southwest rely on the statements of Congressman Wright in support of the House version of the bill, rather than those of Congressman Anderson and Senator Cannon in support of the Committee version; however, Congressman Wright was not a member of the Conference Committee, the bill reported by that Committee was not the House version he had sponsored, and both the House and Senate accepted the compromise provision reported out by the Conference Committee.

On the floor of the House, Congressman Anderson, explaining the Amendment, said: "The prohibition in section 29(c)(1), against an air carrier providing through service or ticketing with another air carrier . . . only applies with respect to a carrier's Love Field service. . . ." 126 Cong. Rec. H. 520 (February 4, 1980). In a colloquy on the Senate floor, Senator Cannon expressed the same understanding. 126 Cong. Rec. S. 952 (February 5, 1980). The legislative history, taken as a whole, supports our view that the intent of Congress in the Love Field Amendment was to limit interstate service at that airport to short-haul, turnaround flights, not to prohibit carriers offering interline services elsewhere from serving Love Field. The floor debates likewise indicate that operations not touching Love Field were not to be included within the prohibitions of the Amendment.

In sum, the Department believes that the plain wording of the Amendment and the legislative history, including the Conference Report and relevant statements by the Amendment's floor managers, show that our less restrictive interpretation of the Amendment is correct. Thus, we find that Continental may serve Houston from Love Field, although the carrier provides interline services

elsewhere on its system. This conclusion is supported by the comments of various parties, including the Justice Department, American West, and Air Midwest. The arguments of the DFW parties and Southwest to the contrary are not persuasive. Further, since we find that Continental may serve Love Field consistent with restrictions of the Amendment, we have determined that it is not necessary to address Continental's additional argument that the amendment may violate the equal protection clause.

Finally, Republic argues that permitting Continental to serve Love Field is unfair in a competitive sense, since our interpretation of the Amendment benefits those carriers who maintain hubs in Texas and the four contiguous states to the exclusion of those who do not. Republic's argument is not convincing. Republic is free to establish its hubs wherever it chooses. There is nothing competitively unfair to Republic in our interpretation of the Love Field Amendment as drafted and intended by Congress.

MARKETING RESTRICTIONS

Continental raised four questions in its comments regarding marketing problems faced by carriers serving Love Field. The statements attached to its comments are a vivid demonstration of the confusion present today in Love Field service. Continental first asks: 1) whether a passenger may buy two tickets (so-called "double ticketing") at Love Field, one for service from Love Field to a point within Texas or the four adjacent states, and a separate, second ticket for service from that destination to a beyond point; and 2) whether the second ticket may be for the carrier's most efficient connecting flight. The

answer to both questions is yes. To hold otherwise would be unreasonable and beyond that needed to effectuate the Amendment's restrictions. *See*, CAB Order 80-12-102 (December 18, 1980).

The language of the Amendment and its legislative history indicate that Congress had two concerns in restricting service to Love Field. First, Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area. Conference Report at 25. However, Congress did not intend to preclude a carrier from operating flights from a destination point served from Love Field to a point outside the Love Field service area. *Id.* at 26. Second, Congress intended to prohibit carriers from promoting, offering, or holding out service from Love Field to a point beyond the service area. Subsection (c). Conference Report at 25. Congress used the word "offer" in the Amendment itself; although the legislative history refers to "holding out." In some contexts, the terms "offer" and "hold out" can be used interchangeably. *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956); *Cf. Grsjewski v. Commissioner*, 723 F2d 1062, (2d Cir. 1983).

"Through service" and ticketing specifically refer to the provision of transportation between an ultimate origin and destination on a single ticket for a single sum fare. *Cf. Tariff Flexibility Rulemaking* ER-1246, Order 81-81-58 (November 10, 1981). *See also, Visit USA/Export/Inland Contract Rate Investigation (VUSA Investigation)*, Order 84-B-55 at 26 (August 10, 1984). The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights. The key concept is that it is sold by the carrier, and perceived by the

passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract.[8] Through service provides certain conveniences for the passengers. For example, the passenger need not reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.

In contrast, double ticketing involves the use of two tickets (hence, two contracts of carriage), the payment of two separate fares, and requires the passenger to forego the service convenience associated with through ticketing. Although Congress prohibited through service and fares at Love Field, it intended that a carrier's "usual ticketing, scheduling and ratemaking practices would not be otherwise affected." Conference Report at 26. Such "other" practices may include double ticketing. *Cf. Interstate and Intrastate Fares in California Markets*, 71 CAB 23 (1976).

The language of the Amendment makes clear that a carrier cannot advertise, promote, or otherwise affirmatively solicit double-ticketing passengers. The question, then, is whether the sale of double-ticketed service at the unsolicited request of a customer amounts to an offer or holding out. Such a sale is not necessarily an offer. An offer is a proposal to sell a ticket or provide transportation. *Frissell v. Nichols*, 94 Fla. 403, 114 So. 431, 433 (1927);

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[8] In the case of connecting flight service, the amount of the fare may be calculated by simply adding the local fares on individual flight segments, or it may be a different, usually lower, fare reflecting costs or competitive considerations. The key concept, again, is that the fare is stated as a single amount. *Cf. VUSA Investigation*, Order 84-8-55 at 27.

Cf. Daitom, Inc. v. Pennwalt Corporation, 741 F2d 1569 (10th Cir. 1984). If a carrier simply responds to a customer's unsolicited request, it has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer, although the carrier's acceptance results in a contract. Congress prohibited carriers from "offering for sale . . . transportation to or from . . . any, point which is outside [the Love Field Service area]"; but neither the wording nor the legislative history prohibits carriers from selling, or passengers from purchasing, transportation to points outside the Love Field service area. While the Amendment prohibits single-plane flights, interline service, through service and ticketing, and advertising and promotion of service outside the Love Field service area, it does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service. Thus, to prohibit double ticketing or the sale of a carrier's most convenient flight from a destination in the Love Field authorized service area to a beyond point exceeds what is necessary to prohibit through service and ticketing from Love Field.

Continental's second question, also asked by Delta, is whether a carrier may display in a computer reservations system under "connections" service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question. It says that "carriers may not hold out, offer or advertise Love Field service to or from points beyond the four

contiguous states in any respect, including the publication of connecting flight schedules in airline guides, flight schedules, or similar media." Conference Report at 25. The ban on advertising of service from Love Field beyond Texas and the four contiguous states is clearly envisioned by the Amendment. The phrase "airline guides, flight schedules, or similar media" includes computer reservations systems. These systems were used at the time of the Amendment's passage and not specifically excluded.

Continental's third, related marketing question is whether a carrier may advertise connecting service and display connecting service, as such, in its flight schedules. Again, the answer is no. Unsolicited information furnished to the public in any form is a means of offering or holding out, which is prohibited. *See, e.g., Red Ball Transit Co. v. Marshall* 8 F.2d 321,323 (S.D. Ohio 1925). Moreover, as discussed above, Congress clearly contemplated prohibiting publication of such flights in individual carrier schedules, as well as industry information media.

Continental's fourth question concerns the marketing of fares and their construction. Continental asks whether a fare could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field to a point in the authorized area, plus that point to a point outside the service fare.) This practice would clearly involve the offer of a through fare, since it could not be considered an anything but a single sum fare. Moreover, it could not be offered as anything but a single contract of carriage, *i.e.*, a single through ticket. This is different from the double-ticketing situation, discussed above, which

involves two separate contracts of carriage. The Conference Committee Report states that " . . . a carrier could not . . . offer through fares between Love Field and points beyond the contiguous States . . . " Conference Report at 26. Therefore, a carrier cannot offer a constructed fare for double-ticketed service originating or terminating at Love Field.

Throughout this discussion on marketing, we have used the term "carrier" to include travel agents or other persons or methods used by the carrier to sell its tickets and services. Whenever an agent is acting for its principal, the same restrictions applied to the principal apply to the agent.

SMALL AIRCRAFT OPERATIONS

In connection with its computer reservations system, Delta asks whether a certificated carrier using small aircraft should be treated the same as a commuter carrier serving Love Field. The Amendment specifically authorizes interstate air transportation at Love by commuter airlines using aircraft of 56 seats or less. The term "commuter airline" is not defined elsewhere in the Amendment. The Amendment's language must, therefore, stand on its own. Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative.[9]

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[9] The Department has taken this approach to all aspects of economic regulation of commuter air carriers. 14 C.F.R. 298.90.

Thus, we find that operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations.

INTRASTATE OPERATIONS

We also asked for comments on whether the Amendment applies to intrastate service within Texas. The Amendment is somewhat ambiguous on this question. Subsections (a) and (b), by their terms, apply only to flights from Love Field to "points outside the State of Texas." Subsection (c), however, states that subsections (a) and (b) do not apply to, and under certain conditions carriers may provide, flights between Love Field and "points within the State(s) of . . . Texas." The Conference Report states that the "provisions do not affect . . . intrastate service in Texas." Conference Report at 25. Thus, we conclude that the Amendment does not apply to service by an intrastate carrier or to service carrying only intrastate passengers by an air carrier.

The more difficult issue, however, is the application of the Amendment to air carriers providing both intrastate and interstate service on the same flight. The CAB faced this question in Order 80-8-181. It decided that carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area. The Department believes the CAB was substantially correct. In our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate

service from Love Field on the same flight without violating the Amendment's restrictions. However, the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

ACCORDINGLY,

1. Continental or its agents may provide service from Love Field, Dallas, Texas, to Houston, Texas;

2. Continental or its agents may sell a ticket from an authorized destination of a flight from Love Field to a point beyond that destination, if demanded by a passenger, separately from the ticket for the Love Field flight, provided the amount of the tickets equals the sum of local fares;

3. Continental or its agents may not by any means whatsoever list or advertise "connecting" flights for an authorized Love Field flight to a point beyond the Love Field service area, including listings in a computer reservation system;

4. Delta may list in its computer reservation system service by certificated air carriers that use aircraft of 56 seats or less serving Love Field in a manner similar to listings for commuter air carriers; and

5. The Amendment does not apply to service by intrastate carriers or intrastate service by an air carrier certificated under the Act.

By:

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

(SEAL)

CIVIL AERONAUTICS BOARD (C.A.B.)

DALLAS/FORT WORTH-FLORIDA
SERVICE INVESTIGATION
Docket 32711
(79-5-231)

Adopted May 31, 1979

May 31, 1979
OPINION AND ORDER

This proceeding involves various applications of 13 air carriers[1] for amendment of their certificates to authorize interstate air transportation between Dallas/Fort Worth and several points in Florida.

After hearing, Administrative Law Judge Katherine A. Kent issued part I of her initial decision; on April 19, 1979, disposing of all but one of the issues in this proceeding. The sole unresolved issue, whether Love Field should be designated as an airport for interstate service at Dallas/Fort Worth, will be the subject of part II of Judge Kent's decision infra.[2]

In part I of her initial decision, Judge Kent awarded to all applicants the authority which they had severally requested, but only for those particular markets for which illustrative schedules had been presented to the

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[1] Air Florida. American, Braniff, Continental, Delta, Eastern, National, North Central, Northwest, Ozark, Southern, Texas International, and Western.

[2] As for Judge Kent's present assertion (initial decision, part 1, p. 805 infra) that the Love Field issue has through 'apparent forgetfulness' been placed in issue in another proceeding, Southwest Airlines, Love Field Interstate Service, 80 C.A.B. 647, 650, n. 8 (1979), shows that she is mistaken.

respective applicants. Consequently, Part I of Judge Kent's initial decision granted in full the applications of Continental, Eastern, National, North Central, Northwest, Ozark, Southern, Texas International, and Western. However, Air Florida, American, Braniff, and Delta had failed to provide illustrative schedules for all markets covered by their applications,[3] and the judge accordingly granted their applications only in part, i.e., for those markets covered by illustrative schedules.

No petitions for review of the authority granted by part I of the initial decision have been received, but American and Braniff have petitioned for review of said decision insofar as it failed to grant their requested authority for markets not covered by illustrative schedules. Our Bureau supports the petitions.

In the absence of any requests for review, we have decided to affirm so much of part I of the initial decision as granted the applications of all 13 air carriers in this proceeding, and all authority so granted may become effective immediately.[4]

However, upon review of so much of part I of the initial decision as denied requests for authority in markets not covered by illustrative schedules, we have decided, for the reasons set forth below, to reverse and reopen the record for consideration of those markets.

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[3] Initial decision, part 1, p. 808 infra.

[4] The initial decision is included herein.

ILLUSTRATIVE SCHEDULES

Judge Kent correctly noted that it has been, and continues to be, the Board's general policy to award authority only in markets for which an applicant has presented illustrative proposals[5] and that all applicants in this proceeding should have complied with this requirement. Nonetheless, as we recently explained in California-Nevada Low-Fare Route Proceeding, 81 C.A.B. 135, 141 (1979), but one day before Judge Kent issued the subject decision, we recognize that there has been a 'lack of clarity with respect to this requirement during the past evolutionary period * * * .' We have therefore decided to accord the instant defective applications the same treatment we gave to those in that case (*ibid.*):

> [Rather than deny the applications as the judge did, to the possible detriment of the applicants and the public, we shall defer them for the present. We shall reopen the record to allow named carriers to submit illustrative proposals for named markets and allow the parties to respond to that newly submitted evidence.

All four carriers whose applications were denied in part by Judge Kent – not only those two who filed petitions for review – will have an opportunity to cure their defective applications by submitting illustrative schedules.[6]

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[5] Initial decision, part I. p. 808 infra, n. 7, citing Northeast Points-Puerto Rico/Virgin Is, Service, 79 C.A.B. 312, 316-317 (1978).

[6] In light of our multiple certificate awards, we are dismissing the application of American and Delta for exemption authority in some of the markets involved in this proceeding.

ACCORDINGLY –

1. We amend the certificates of Air Florida, American, Braniff, Continental, Delta, Eastern, National. North Central, Northwest, Ozark, Southern, Texas International, and Western as shown included herein appendix A;

2. The amended certificates shall be signed on behalf of the Board by the Secretary, shall have affixed the seal of the Board, and shall be effective on the date of this order: Provided, however, That the continuing effectiveness of the authority granted here shall be conditioned upon the timely payment of such license fees as may be prescribed by the Board;

3. The authority granted to North Central, Ozark, Southern, and Texas International shall be classified as subsidy ineligible, category II;

4. We defer the requests for authority indicated in appendix B;

5. We reopen the record to receive service proposals containing the information set forth in appendix C for those carriers in those markets set forth in appendix B. Such proposals shall be filed within 15 days after service of this order[7] and responsive pleadings may be filed within 10 days thereafter;

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[7] We accept the service proposals submitted subsequent to the initial decision by American and Braniff; answers to these proposals will be filed within 10 days of the service date of the order. The Tampa Bay Area Parties' answer supporting American's petition is deemed to be filed as an answer supporting American's service proposal.

6. We dismiss the applications for exemption authority in dockets 33234 and 33358.

All Members concurred.

Civil Aeronautics Board (C.A.B.)

APPENDIX A

Amendments to certificate of Air Florida, Inc.

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
American Airlines, Inc., for route 4

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be several through DFW Regional Airport), the intermediate points Orlando and West Palm Beach, and the terminal point Fort Lauderdale.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Braniff Airways, Inc., for route 9

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Orlando and West Palm Beach, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Continental Air Lines, Inc., for route 29

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth. Amend the condition which currently reads: 'Flights serving Tampa-St. Petersburg-Clearwater and Orlando, Fla., shall also serve Houston' to make it applicable only to flights on the segment which reads 'Between the terminal point Houston, Tex., and the coterminal points Tampa-St. Petersburg-Clearwater and Orlando, Fla.'

Amendments to certificate of
Delta Air Lines, Inc., for route 24

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Eastern Air Lines, Inc., for route 5

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Orlando and Jacksonville, and the terminal point West Palm Beach.

Amendments to certificate of
National Airlines, Inc., for route 39

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth. Amend condition 3 by adding:

Provided that this condition shall not apply to flights on segment . . .

Amendments to certificate of
North Central Airlines, Inc., for route 86

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Northwest Airlines, Inc., for route 2

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater, Orlando, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Ozark Air Lines, Inc., for route 107

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate

points Orlando, and Jacksonville, and the terminal point West Palm Beach.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Southern Airways, Inc., for route 98

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Texas International Airlines, Inc., for route 82

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater, Jacksonville, Orlando, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Western Air Lines, Inc., for route 19

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth. The effective date of this authority is June 4, 1979.

APPENDIX B

Additional Florida points for which certificated authority is requested: Air Florida – West Palm Beach, Orlando, and Jacksonville; American – Tampa and Miami; Braniff – Tampa, Jacksonville, and Fort Lauderdale; Delta – Jacksonville and Orlando.

APPENDIX C

Service proposals covering points set forth in appendix B are to disclose (1) type and capacity of equipment likely to be used; (2) elapsed trip time of flights in block-hours over the segment(s); (3) environmental evaluation, as required by 14 CFR part 312; (4) estimate of gallons of fuel to be consumed in the first year of operations; (5) statement as to availability of required fuel.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE KATHERINE A. KENT

- PART I

Certificates of Air Florida, American, Braniff, Continental, Delta, Eastern, National, North Central, Northwest, Ozark. Southern, Texas International and Western amended to authorize permissive, subsidy-ineligible air transportation between Dallas/Fort Worth and various points in Florida, provided that all flights must serve Dallas/Fort Worth and provided further that Dallas/Fort Worth shall be served through the Dallas/Fort Worth Regional Airport until the Board determines whether Love Field should be designated as an airport for interstate service at Dallas/Fort Worth. The Love Field issue will be decided by part II, infra, of this initial decision after the filing of briefs by the parties. This decision does not constitute a major Federal action significantly affecting the quality of the human environment.

APPEARANCES:

Robert P. Silverberg and Benjamin P. Lamberton for Air Florida, Inc.
Carl B. Nelson, Jr. for American Airlines, Inc.
Carol A. Cichowski for Braniff Airways, Inc.
Beth Troiano for Continental Air Lines, Inc.
Douglas L. Abramson for Delta Air Lines, Inc.
Naomi Licker for Eastern Air Lines, Inc.
Edwin O. Bailey for National Airlines, Inc.
Ronald D. Eastman and Stephen C. Trow for Northwest Airlines, Inc.
Thom G. Field for Ozark Air Lines, Inc.
William A. Nelson for Southern Airways, Inc.
Paul Y. Seligson for Southwest Airlines Co.

Harold J. Pareti for Texas International Airlines, Inc.
Robert Bauer for Western Air Lines, Inc.
Arthur Petersen, Charles C. Wells, and C. Merrill Bierfield for the Dallas/Fort Worth Parties.
Robert M. Beckman and Angela C. Beckman for the Tampa Bay Area Parties.
Robert G. Cross for the Texas Aeronautics Commission (rule 14 participant).
Joseph Bolognesi and Thomas G. Chew for the Bureau of Pricing and Domestic Aviation.

CHRONOLOGY

March 21, 1978. – American Airlines filed an application and motion for hearing requesting nonstop authority between Dallas/Fort Worth and Miami/Fort Lauderdale.

June 12, 1978. – The Board served order 78-5-129, instituting the Dallas/Fort Worth-New Orleans-Florida Service Investigation, an investigation of the need for nonstop authority in nine markets – Dallas/Fort Worth-Tampa, Dallas/Fort Worth-Miami, Dallas/Fort Worth-Fort Lauderdale, New Orleans-Tampa, New Orleans-Miami, New Orleans-Fort Lauderdale, Tampa-Miami, Tampa-Fort Lauderdale, and Miami-Fort Lauderdale – and consolidating applications of American and Texas International Airlines. The order included the boilerplate language current at that time instructing the judge to take low-fare offers into consideration in deciding the issue of public convenience and necessity and noted in a footnote that the Board was contemplating a change in its directions to judges in this matter and would issue a subsequent order. Various carrier and civic interests were made party to the investigation including the Dallas/Fort Worth Parties.

June 13, 1978. – The judge issued a notice of prehearing conference to be held on July 25, 1978.

June 28-July 3, 1978. – Applications and motions to consolidate were filed by 12 carriers. Petitions for reconsideration were filed by four carriers, as well as one petition for clarification.

July 19, 1978. – The judge issued order 78-7-68, granting the motions of 12 carriers to consolidate: Air Florida, American, Braniff, Continental, Delta, National, North Central, Northwest, Piedmont,[1] Southern, Texas International, and Western.[2]

July 25, 1978. – Prehearing conference was held, at which November 29, 1978, was set as the date for hearing.

July 27, 1978. – The judge's report of prehearing conference was issued. It was served on August 4, 1978.

August 2, 1978. – The Board served order 78-7-128 (Florida Service Case Evidence, 77 C.A.B. 880 (1978)) in the Florida Service Case, docket 33091, which affected this proceeding in two respects and resulted in postponement of the hearing from November 29, 1978, to March 20, 1979: (1) August 2-11, 1978 – Florida Service Case, Evidence, supra, revised the boilerplate the Board had

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[1] On August 22, Piedmont withdrew its application, which was then dismissed by order 78-11-46 served Nov. 14, 1978.

[2] Ozark Air Lines filed a late application and motion to consolidate, which was dismissed by onder [sic] 78-7-151, served July 27, 1978. Ozark subsequently reapplied after the Board's order changing the scope of the investigation (78-11-15), and its application was consolidated (78-11-158).

used in previous orders instituting route proceedings (including this investigation), announcing that it was not interested in low-fare offers or price/quality options. Because of the imminence of a date upon which exhibits were to be filed (August 18), the judge issued an order on August 7, 1978, applying the Board's new philosophy and eliminating issues and evidence requests related to fare proposals in order to relieve the parties of the burden of compliance, even though Florida Service Case, Evidence, supra, did not apply to this case. On August 11, 1978, the Board served order 78-8-48, amending orders in nine cases, including this one, to include its new boilerplate language. (2) August 2-September 18, 1978 – order 78-7-128 (77 C.A.B. 880) also instituted the Florida Service Case, which included investigation of service in six of the nine markets already in issue in this case – New Orleans-Tampa, New Orleans-Miami, New Orleans-Fort Lauderdale, Tampa-Miami, Tampa-Fort Lauderdale, and Miami-Fort Lauderdale. On September 5, 1978, the judge submitted to the Board a certification requesting that the Board clarify whether it intended that service in these six markets be investigated in both cases or not and requesting that the Board respond promptly, since direct exhibits were to be filed by the parties to this case on September 22. The Board not having acted on this request nor on the petitions for reconsideration filed June 30-July 3, the judge on September 18, 1978, issued an order postponing procedural dates in this case in view of the uncertainty as to the scope of the investigation.

October 24, 1978. – The Airline Deregulation Act of 1978, amending the Federal Aviation Act of 1958, became law upon signing by President Carter.

November 9, 1978. – The Board served order 78-11-15, acting on the petitions for reconsideration in this case and the Florida Service Case and on the judge's September 5 certification to the Board. The order removed from this case the three New Orleans markets, added three new Florida points (Orlando, Jacksonville, and West Palm Beach), changed the focus of the investigation from nonstop service in the markets to service 'between and among' the seven remaining points (Dallas/Fort Worth, Tampa, Miami, Fort Lauderdale, Orlando, Jacksonville, and West Palm Beach) with the proviso 'that any authority awarded shall be subject to the condition that all flights must serve Dallas/Fort Worth,' renamed the case the Dallas/Fort Worth-Florida Service Investigation, and noted that the substantive provisions of the Airline Deregulation Act of 1978 would be applicable to the proceeding.

Order 78-11-15 also dealt with the petition for clarification filed by Air Florida on July 3. According to the Board's order, Air Florida requested that the Board 'not preclude service to Dallas/Fort Worth through Love Field instead of, or in addition to, DFW Regional Airport.' The Board responded as follows (emphasis added):

As to Air Florida's airport question, the instituting order did not designate the airport through which Dallas is to be served, and we have decided to leave the question open for now rather than to impose a pretrial restriction. The parties should address this issue in their exhibits and testimony, and the judge should deal with it in the initial decision.

November 14, 1978. – The judge issued a notice directing that a second prehearing conference would be held on December 19, 1978 (amended by notice to all parties dated November 22).

December 4, 1978. – Order 78-11-158 was served, granting motions to consolidate new applications filed in response to order 78-11-15 by 13 carriers, who are the final applicants in this case: Air Florida, American, Braniff, Continental, Delta, Eastern, National, North Central, Northwest, Ozark, Southern, Texas International, and Western. On the same day, Southwest Airlines Co. was granted permission to intervene (order 78-12-15).

December 19, 1978. – The second prehearing conference was held, at which revised issues and evidence requirements were adopted and new procedural dates were established, setting hearing for March 20, 1979. Specifically in issue was the following, in response to the Board's direction in order 78-11-15, as to which the parties were ordered to produce evidence: 'Should Love Field be designated as an airport for interstate service at Dallas/Fort Worth?'

December 28, 1978. – The judge's report of the second prehearing conference was issued, which was served on January 5, 1979.

January 10, 1979. – A supplemental report of the prehearing conference was served, deleting most of the evidence requirements imposed in the previous report in recognition of the Board's elimination of the necessity for evidence showing fitness, willingness, and ability by Chicago-Midway Expanded Service Investigation, 80 C.A.B. 479 (1979).

March 20-22, 1979. – Hearing was held. As a result of all the preceding events, the only controverted issue in the 3-day hearing was the Love Field issue, which was fully tried. While the hearing was in progress, the Board, in apparent forgetfulness, ordered the parties to try the same issue over again before another judge by order 79-3-150 dated March 22, 1979 (80 C.A.B. 647).

March 23, 1979. – The judge issued an order stating that no briefs would be necessary on the noncontroversial issues of route authority and that, in order that service not be delayed, she would issue this part I of the initial decision granting certificate authority to all 13 applicants in accordance with the illustrative schedules presented in evidence, limited to service at Dallas/Fort Worth Regional Airport.[3] Briefs with respect to the Love Field issue were ordered to be filed on April 19, 1979, after which part II of the initial decision would be issued dealing with that subject.

April 10, 1979. – Because major portions of the transcript received from the Acme Reporting Company were incomprehensible, the judge acquired the tapes on April 2 and went over the entire transcript, issuing eight orders extensively correcting the transcript between April 4 and April 9. Since the transcript of hearing on the Love Field issue is very important in this case (tr., pp. 556-557), and copies of the principal orders correcting it would not be served upon the parties until the week briefs were due, the judge postponed the brief date until May 8, 1979.

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[3] See n. 4, infra.

FINDINGS AND CONCLUSIONS

As indicated previously, this part I is limited o [sic] the uncontroverted issue of certificate authority for all 13 applicants in accordance with the illustrative schedules presented in their exhibits and is issued separately in order that new service may be inaugurated by those carriers who wish to do so without delay. The separate issue whether Love Field should be designated as an airport for interstate service, which, after all, is urged by only one of the 13 applicants (Air Florida), will be decided in part II of this initial decision after the parties file briefs on that subject. In the meantime, all the carriers may, commence service using Dallas/Fort Worth Regional Airport.[4]

Aside from the Love Field issue no exhibits were presented in opposition to any carrier's illustrative schedule, nor was there any cross-examination; and no party requested the filing of briefs. There is thus no reason to delay decision.

Section 401(d)(1) of the Act requires that the Board issue a certificate authorizing the whole or any part of the transportation covered by any application:

* * * if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to

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[4] This is in conformity with the Board's action in Southwest Airlines, Love Field Interstate Service, 80 C.A.B. 647 (1979), wherein Southwest Airlines was authorized to serve Dallas-New Orleans through the Dallas Forth Worth Regional Airport pending final decision on the same issue in docket 34582.

the provisions of this Act and the rules, regulations, and requirements of the Board thereunder, and that such transportation – (A) in the case of interstate or overseas air transportation, is consistent with the public convenience and necessity * * * .

Section 401(d)(9)(A) of the Act provides that the applicant has the burden of showing that it is fit, willing, and able. The Board has stated that it views 'fitness, willingness, and ability essentially as a measure of a carrier's qualification to provide a broad category of service' and that 'once a carrier has shown that it is 'fit, willing, and able' to perform service of a certain basic scope and character, it need not present additional evidence of its ability to operate within the scope of service in other markets.'[5] All the applicants in this case other than Air Florida are carriers which have long been certificated to provide and have provided in other markets, scheduled air transportation of the scope and character they might provide in the markets in issue here. They are therefore qualified under the Board's criteria.

As to Air Florida, at the second prehearing conference (December 19, 1978), the judge ruled that, since that carrier's fitness was already at issue in a case then pending before another judge where the full panoply of fitness evidence had been presented, that judge's decision on the issue would be adopted here. On February 22, 1979, Judge William A. Kane, Jr., issued his recommended decision in the U.S.-Bahamas Service Investigation, docket 32294, which was served on March 8, 1979. Judge Kane

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[5] Chicago-Midway Expanded Service Investigation, *supra*.

examined extensive evidence on Air Florida's fitness and on its relationships under section 408 and 409 of the Act. Those portions of Judge Kane's decision and his findings and conclusions dealing with those issues are hereby incorporated herein.[6]

The 13 applicants herein are found to be citizens of the United States within the meaning of the Act and are fit, willing, and able properly to perform the air transportation authorized herein and to conform to the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and requirements of the Board thereunder.

Sections 401(d)(9)(B) and (C) provide that an opponent of an application has the burden of showing that the transportation applied for is not consistent with the public convenience and necessity and that such transportation shall 'be deemed to be consistent with the public convenience and necessity, unless the Board finds based upon a preponderance of the evidence that such transportation is not consistent with the public convenience and necessity.' Since no evidence has been presented in opposition to the applications, it is found that the transportation applied for is consistent with the public convenience and necessity.

In accordance with the Board's policy of granting all applications for which the applicants have submitted illustrative schedules, this decision will amend the certificates of all the applicants to authorize them to provide

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[6] Docket 32294, recommended decision served Mar. 8, 1972, pp. 49-50 and app. F.

service, on a subsidy-ineligible basis, between Dallas/Fort Worth Regional Airport and the points for which they have presented illustrative schedules in evidence. In conformity with the Board's order 78-11-15, such authority will be subject to the condition that all flights must serve Dallas/Fort Worth. Also in accordance with Board policy, authority is not awarded in markets for which no illustrative schedules were presented.[7]

Footnote 11 in order 78-11-15 stated that carriers could apply for, and the judge could award, authority 'as one segment, as six separate segments, or as any combination between the two.' Since this permission would result in 63 different possibilities of awards for each applicant,[8] the judge requested that each applicant make clear in its exhibits just what authority it was seeking. Except as noted in footnote 7 herein, the applicants have done so in their illustrative schedules, and the awards made herein are in conformity with those exhibits.

It must be recognized that some of the carriers granted certificate authority herein already have

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[7] As noted subsequently, only 4 of the 13 applicants (Air Florida. American, Braniff, and Delta) did not comply with the Board of policy of providing illustrative schedules for all authority requested. All parties had been on notice of such policy at least since Northeast Points-Puerto Rico Virjin [sic] Is. Service 79 C.A.B. 312 (1978), (mid-December of 1978), and direct exhibits were not filed in this case until Jan. 26, 1979. The other nine carriers complied.

[8] The attachment to app. B of report of second prehearing conference served Jan. 5, 1979, lists the 63 possible awards.

authority in some of the markets included in this investigation,[9] either under previously effective certificates, by grants under the unused-authority provisions of the Act, by action law,[10] or by other actions of the Board.[11]

Air Florida's illustrative schedules,[12] show round-trip service, Dallas/Fort Worth-Tampa-Miami and Dallas/Fort Worth-Miami-Fort Lauderdale, as well as one-way service Dallas/Fort Worth-Fort Lauderdale and Fort Lauderdale- Miami-Tampa/St. Petersburg/Clearwater[13]-Dallas/Fort Worth. Its proposed certificate[14] suggests a linear route description, which will be adopted (Dallas/Fort Worth-Fort Lauderdale-Miami-Tampa) with right to begin or terminate trips at points short of terminal points, subject to the Board's restriction that all flights must serve Dallas/Fort Worth. This description will permit Air Florida to perform the service described in its illustrative schedules, plus other combinations of service

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[9] For example, the 'Official Airline Guide' for Apr. 1, 1979, shows the following carriers offering service in the Dallas/Fort Worth-Florida markets; DFW-FLL – Braniff, Eastern; DFW-JAX – Braniff, Delta, Eastern; DFW-MIA – American, Braniff, Eastern; DFW-MCO – Braniff, Delta; DFW-TPA – American, Braniff, Delta; and DFW-PBI – Braniff. The intra-Florida markets are, of course, served by scalds [sic] of schedules.

[10] Such as the incorporation of Air Florida's intrastate service into its interstate certificate under the Deregulation Act.

[11] For example, the Board has granted many carriers operating authority between Miami and Fort Lauderdale. Orders 78-8-192, 78-11-53, 79-2-42 (80 C.A.B. 406).

[12] Exs. AF-D-100 to AF-D-102.

[13] Hereafter referred to as Tampa.

[14] Ex. AF-D-600.

among the points. As discussed previously, points included in Air Florida's proposed certificate for which it has presented no illustrative schedules (West Palm Beach, Orlando, and Jacksonville) will not be awarded in this case.

American's illustrative schedules[15] show round-trip service between Dallas/Fort Worth-Orlando-Fort Lauderdale and Dallas/Fort Worth-West Palm Beach, as well as one-way service Dallas/For [sic] Worth-Orlando-West Palm Beach and Orlando-Dallas/Fort Worth. American's proposed certificate,[16] like Air Florida's, suggests a linear route description, which will be adopted (Dallas/Fort Worth – Fort Lauderdale – Orlando – West Palm Beach), and it also includes points for which no illustrative schedule has been presented (Tampa and Miami), which will not be awarded in this case.[17]

Braniff's illustrative schedules[18] show round-trip service between Dallas/Fort Worth-Orlando-West Palm Beach, Dallas/Fort Worth-Orlando-Miami, and Dallas/

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[15] Ex. AA-200.

[16] Ex. AA-600.

[17] See previous discussion of Air Florida. American's illustrative schedules show service between Tampa-West Palm Beach, Orlando-Miami, and Miami- Tampa, but these are for Houston service, not Dallas/Fort Worth, as required by the Board. As noted previously (n. 9), American now operates Dallas/Fort Worth-Miami and Dallas/Fort Worth-Tampa.

[18] Ex. BI-200.

Fort Worth-West Palm Beach-Miami. Like the two previous carriers, Braniff proposes a linear route description[19] which will be adopted (Dallas/Fort Worth – Miami – Orlando – West Palm Beach), and points not included in its illustrative schedules (Tampa, Jacksonville, and Fort Lauderdale) will not be awarded in this case.[20]

Continental's illustrative schedules[21] show round trips between Dallas/Fort Worth-Fort Lauderdale-Miami, Dallas/Fort Worth Jacksonville-Tampa, Dallas/Fort Worth-Miami, Dallas/Fort Worth Orlando-Fort Lauderdale, Dallas/Fort Worth-Tampa-Orlando, and Dallas/Fort Worth-West Palm Beach-Miami. Continental's linear route description[22] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Delta's illustrative schedules[23] show round trips between Dallas/Fort Worth-Miami, Dallas/Fort Worth-Fort Lauderdale, Dallas/Fort Worth-West Palm Beach,

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[19] Ex. BI-211.

[20] Braniff already has authority to provide service between Dallas/Fort Worth and these three points; see n. 9, *supra*. Braniff's requested coterminalization of Miami and Fort Lauderdale on segments 8, 10, and 12 of its certificate for route 9 was granted by order 79-?? -42, (See n. 11, *supra*.) Its illustrative schedules in this case show no Fort Lauderdale service, but it may presumably tack Miami-Fort Lauderdale service onto authority granted here. Braniff has obtained authority in several of the markets in issue here under the unused-authority provisions of the Act.

[21] Ex. CO-D-201.

[22] Ex. CO-D-600.

[23] Ex. DL-200.

and Dallas/Fort Worth-Tampa. As for the other applicants, Delta's proposed linear route description[24] will be adopted (Dallas/Fort Worth – Fort Lauderdale – Miami – Tampa – West Palm Beach), excluding the points not included in the illustrative schedules (Jacksonville and Orlando).[25]

Eastern's illustrative schedules[26] show round-trip service between Dallas/Fort Worth-Jacksonville, Dallas/Fort Worth-Orlando, and Dallas/Fort Worth-West Palm Beach. Again, the linear route description[27] proposed by the carrier (Dallas/Fort Worth-Jacksonville-Orlando-West Palm Beach) will be adopted.

National's illustrative schedules[28] show round trips between Dallas/Fort Worth-Fort Lauderdale, Dallas/Fort Worth-Jacksonville, Dallas/Fort Worth-Miami, Dallas/Fort Worth-Orlando, Dallas/Fort Worth-Tampa, and Dallas/Fort Worth-West Palm Beach. Again, the proposed linear route description[29] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

North Central's illustrative schedules[30] show round trips between Dallas/Fort Worth and Fort Lauderdale,

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[24] Ex. DL-400.

[25] As seen in n. 9, *supra*. Delta already has authority to and does operate between Dallas/Fort Worth and these two points.

[26] Ex. EA-101.

[27] Ex. EA-102.

[28] Ex. NAL-200.

[29] Ex. NAL-600.

[30] Exs. NCA-2 and NCA-3.

Jacksonville, Miami, Orlando, Tampa, and West Palm Beach, and Dallas/Fort Worth-Orlando-Miami. North Central's proposed linear route description[31] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Northwest's illustrative schedules[32] show round trips between Dallas/Fort Worth-Miami, Dallas/Fort Worth-Orlando-Fort Lauderdale, and Dallas/Fort Worth-Tampa-Orlando. Its proposed linear route description[33] (Dallas/Fort Worth – Fort Lauderdale – Miami – Orlando – Tampa) will be adopted.

Ozark's illustrative schedules[34] show round trips between Dallas/Fort Worth and Orlando, Jacksonville and West Palm Beach, and Dallas/Fort Worth- Jacksonville-West Palm Beach. Ozark's proposed linear route description[35] (Dallas/Fort Worth – Jacksonville – Orlando – West Palm Beach) will be adopted.

Southern's illustrative schedules[36] show round trips between Dallas/Fort Worth and each of the Florida points, as well as round trips between each of the intra-Florida points. Its proposed linear route description[37] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville –

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[31] Ex. NCA-5.

[32] Ex. NW-201.

[33] Ex. NW-602.

[34] Ex. OZ-100.

[35] Ex. OZ-104.

[36] Ex. SO-101.

[37] Ex. SO-103.

Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Texas International's illustrative schedules[38] show round trips in 16 nonstop and one-stop combinations involving all the Dallas/Fort Worth-Florida points. Its proposed linear route description[39] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Western's illustrative schedules[40] show round trips between Dallas/Fort Worth and Fort Lauderdale, Miami, Orlando, Tampa, and West Palm Beach. Its proposed linear route description[41] (Dallas/Fort Worth – Fort Lauderdale – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

The route awards being made will provide a wide variety of service opportunities, with each carrier emphasizing different market combinations and types of service.

ENVIRONMENT, ENERGY, AND LICENSE FEES

On March 16, 1979, the Bureau of Pricing and Domestic Aviation filed a notice of environmental rejection, finding that any subsequent action by the Board on the applications herein does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of

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[38] Ex. TXI-200.

[39] Ex. TXI-600.

[40] Ex. WA-1.

[41] Ex. WA-4.

the National Environmental Policy Act of 1969. That finding is hereby adopted.

The carriers' estimates of their annual fuel consumption (in gallons) are as follows:[42] Air Florida, 6,415,600; American, 9,465,000;[43] Braniff, 8,014,000; Continental, 13,974,000-15,306,000; Delta, 9,327,000; Eastern, 6,605,578; National, 26,809,164; North Central, 11,169,000; Northwest, 6,846,000; Ozark, 6,056,400; Southern, 14,162,259; Texas International, 30,492,856; and Western, 11,957,760.

The total is over 160 million gallons. In view of all the services already provided and with only a little over a million true O&D passengers in all these markets in the year ended June 30, 1978, there is no possibility that all the carriers will operate all the flights shown in their illustrative schedules. Additional fuel consumption as a result of the awards made here will thus undoubtedly be considerably less than that projected. On the other hand, it will also probably be substantially in excess of the 10-million-gallon threshold defining a major regulatory action in the Board's regulations.[44] However, on a record

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[42] Exs. AF-D-105, AA-292, BI-209, CO-D-202, DL-300, EA-101, NAL-201, NCA-4, NW-603, OZ-101, SO-102, TXI-601, and WA-3.

[43] Includes only those operations granted herein.

[44] In recent orders the Board has apparently changed its interpretation of the Energy Policy and Conservation Act. Rather than considering the total additional fuel consumption that may result from its regulatory action, the Board now considers the additional fuel consumption of each applicant separately in determining the 10-million-gallon threshold (Compare, for example, -Atlanta Route Proceeding, 79 C.A.B. 266, 270 (1978), with Service to Birmingham Proceeding, 81

devoid of evidence of public benefits, as is this one, it is not possible to make the findings required by 14 CFR 313.6(a). Nevertheless, the Board has always, as far as this judge is aware, found that, whatever the fuel consumption may be, the public benefits of multiple awards outweigh any increase in fuel usage.[45] That conclusion is adopted here.

There being no evidence with respect to increase in annual gross transport revenues, no determination as to license fees can be made.

An appropriate order and amendments to the carriers' certificates are attached.

[The proposed order and amendments referred to here are omitted since they are superseded by those printed *supra*].

PART II

Love Field may not be designated by the Board as an airport for interstate service at Dallas/Fort Worth. The application of Air Florida to use Love Field in interstate service is denied.

C.A.B. 843, (1979) and Dallas/Fort Worth- Cincinnati-Nonstop, 81 C.A.B. 848, (1979).) Following that approach, 6 of the 13 applicants herein project more than the threshold amount of fuel usage.

[45] *See*, for example, Transcontinental Low-Fare Route Proceeding, 80 C.A.B. 11, 34-36 (1979).

BACKGROUND

The history of this proceeding up to this time is given above on pages 803-806 of part I of this initial decision, served on April 19, 1979. That decision found all the applicants to be fit, willing, and able (pp. 806-808); granted each applicant authority to provide service between Dallas/Fort Worth Regional Airport and the points for which it had presented illustrative schedules in evidence (pp. 809-811); made the required findings as to environment at Dallas/Fort Worth and energy (pp. 811-812); and reserved for this part II the decision as to Air Florida's request to use Dallas Love Field in interstate operations (pp. 814-816). By order 79-5-231 served June 4, 1979, the Board affirmed the awards made in part I of this initial decision and permitted the filing of illustrative schedules by those carriers whose applications were denied in part.

Briefs regarding the Love Field issue were filed on May 17, 1979, by applicants Air Florida and American, the Dallas/Fort Worth Parties, the Bureau of Domestic Aviation (BDA), and intervenor Southwest Airlines.[1] As noted in part I, the same issue has been tried separately before Judge William A. Kane, Jr., in docket 34582, who received briefs on the same day. In an order dated June 11, 1979, this judge announced that she would consider in deciding this part II the additional evidence presented in docket 34582 as an extension of the evidence in this case and the briefs of the parties in that case on the same

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[1] Statements of position were filed by Air Florida, Ozark Air Lines, BDA, Broward County, San Antonio, TAC, Richard J. Sullivan, and Congressman William H. Harsha.

issue. Additional parties filing briefs therein are Frontier Airlines, the U.S. Department of Transportation, the Texas Aeronautics Commission (TAC),[2] the Bureau of Consumer Protection (BCP), and Thomas A. Neddy.[3]

FINDINGS AND CONCLUSIONS

In the State of Texas, the neighboring cities Dallas and Fort Worth have been economically competitive from early days. That rivalry continued as air transportation developed in the United States: 'For many years the Cities of Dallas and Fort Worth were engaged in a fierce, intense and sometimes bitter rivalry for the business of commercial aviation and commercial air carriers.'[4] In the midfifties of this century, increased use of Dallas Love Field by interstate carriers threatened the continuing viability of Fort Worth's newly built Greater Southwest International Airport (GSIA, then known as Amon Carter Field). The two airports were about 12 miles apart, and considerable sums of money were being committed by each city to gain traffic for itself at the expense of the other. In late 1955 Fort Worth requested that the Civil Aeronautics Board conduct a proceeding to determine adequacy of service to Fort Worth, and the Board instituted an investigation in February 1956.[5] The Board initially found in 1958 that service at Fort Worth was not

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[2] TAC was a rule 14 participant in this case and a rule 15 party in docket 34582.

[3] A rule 14 participant in docket 34582.

[4] *City of Dallas, Texas v. Southwest Airlines Company*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973).

[5] Order E.-10003.

inadequate;[6] but it subsequently reopened the record and ordered an upgrading of service in 1960,[7] only to reopen the record again a year later for further hearing.[8]

This was, of course, the era in which basic technological changes were taking place in commercial aircraft. And it was at about this time, in 1961, that the FAA and the CAB issued a joint public statement urging the development of regional airports to serve adjacent communities in order to save money and improve service, which the FAA said would be 'an increasingly important factor in considering applications for federal funds for airport construction.'

On August 20, 1962, the Civil Aeronautics Board instituted the Dallas-Fort Worth Regional Airport Investigation, one of a series of investigations relating to consolidation of air services for specific areas at a single airport, consequent upon the greatly expanded capacity in new high-performance jet aircraft. The reason for instituting the particular case at that time was that the Board had 'recently been apprised of the intention of both of these communities to invest substantial funds to meet the anticipated needs of increased air carrier services at airports which are only 12 miles apart.'[9]

It is very clear from the docket in the DFW Regional Airport case (encompassing 22 volumes of exhibits and testimony) that the Cities of Dallas and Fort Worth were

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[6] Fort Worth Investigation, 27 C.A.B. 260 (1958).

[7] Fort Worth Investigation, 31 C.A.B. 803 (1960).

[8] Fort Worth Investigation, 33 C.A.B. 479 (1961).

[9] Docket 13959, order E-18719.

at swords' points throughout the entire proceeding, which included 25 days of cross-examination between July 8 and September 19, 1963. Fort Worth favored the designation of its GSIA as the regional airport. Dallas took the position that the Board had no authority to require service for the two cities at a single airport but that, if the Board should nevertheless determine to do so, the airport should be Love Field. The Bureau supported Fort Worth's position, and the other parties (carriers and FAA) were divided on the issues as to whether a single airport should be designated and, if so, which airport should be selected.

The FAA participated extensively in that proceeding. In testimony submitted on June 26, 1963, its chief policy witness asserted that 'the Administrator of the FAA has been designated by the Congress as the Federal authority on the suitability of the location of civil airports and their capability to serve the needs of civil aeronautics safely and efficiently.' It was the opinion of the FAA that –

* * * because of its physical limitations, because of the intensely developed and highly valuable property surrounding Love Field; because of the obvious fact that any further lengthening of the runways at Love Field would serve merely to compound the aircraft noise problem, and for other equally good reasons, it appears that Love Field cannot be developed economically into the type of facility needed to serve the future requirements of this area. It follows, therefore, even if the Greater Southwest International Airport did not exist, the appropriate local officials would be well advised to consider a plan to develop a more adequate air carrier airport in any event.

Although the FAA did not consider Love Field to be unsafe, its representative said:[10]

At Love Field, the close-in portion of all approach areas to all runways is over either residential, commercial, or industrial areas which are densely populated. The FAA has imposed restrictions to make these operations equal to the established minimum safety requirements. It is clear, however, tht [sic] safety to the occupants of an aircraft and to the people on the ground is infinitely greater if the approaches to the airport are clear and the path that the aircraft is required to fly is not over highly populated areas. Accident statistics show that during the period from 1955 through 1962, 11% of air carrier accidents occurred within 5 miles of the approach end of the runway. More than half of this 11% occurred within 1 mile of the approach end of the runway. It is apparent that an accident of this nature at Love Field would be catastrophic.

Indeed, the FAA Administrator, Najeeb Halaby, is reported to have 'issued an ultimatum to the City of Dallas that, because of the obsolete nature of Love Field, its inadequacies, the FAA would not put another penny into the development of Love Field until the cities got together and developed a single airport to serve that area.'[11]

After the filing of briefs in December 1963, Judge Ross I. Newmann's initial decision was served on April 7, 1964. Upon consideration of all the facts of record and the

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[10] Docket 13959, written testimony of FAA, pp. AA-3-9.

[11] Docket 34582, tr., p. 137.

arguments of the parties, Judge Newmann concluded that it would not be in the public interest to designate either GSIA or Love Field as a regional airport to serve the Dallas-Fort Worth area.

In the case of GSIA, there would be little or no improvement over existing air services. Savings to the air carriers, the communities, and the Government would be outweighed by the additional costs involved. * * * While Love Field can meet the area's current needs and its needs for the immediate future, its expansion capability from a long-range standpoint presents an extremely serious problem. In short, Love Field's time is running out.'

The judge suggested that solution to the airport problem lay in voluntary cooperation between the two cities to establish a supplemental airport to serve the north Texas area.

Dallas, which apparently intended to continue operating Love Field in addition to any 'supplemental' airport, agreed with the judge; but Fort Worth asked the Board to overrule him and designate GSIA. During May, there was some skirmishing for position between the two cities as to which was the most cooperative; however, the Bureau expressed the view that 'there is no realistic possibility of agreement without Board compulsion.'[12] On brief, the Bureau urged the Board to designate GSIA, but stated that, if the Board wanted to allow the cities 'one more chance,' it should limit the time allowed and 'make

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[12] Docket 13959, vol. 20, repy of Bureau filed May 28, 1964.

clear that it will, on the basis of this record, designate an area airport if the cities cannot reach such agreement.'

After receiving briefs and hearing oral argument, the Board on September 30, 1964, apparently in agreement with the Bureau's assessment, issued an order in which it stated that 'the Board is now of the unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger services,' and continued:[13]

Before proceeding to the entry of a formal decision in this case, the Board believes that it is in the public interest to afford the interested communities a final opportunity to arrive at a voluntary solution as to the location of the airport to be designated and the steps that should be taken to achieve this result at a reasonable time in the future. We have faith and confidence that the cities of Dallas and Fort Worth can arrive at a fair and equitable solution of this problem and we therefore have decided to give the communities a period of 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Board. Although we are convinced that the determination of the airport through which the service shall ultimately be provided should be made without delay, we are aware of the practical difficulties involved in the transition to service through a single airport, and contemplate a voluntary arrangement for an orderly transfer that will be finally

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[13] Order E-21341.

effected no later than sometime in 1968. Should the parties, contrary to our expectation, be unable to agree to designation of the airport to serve the area, the Board will then proceed promptly to issue a decision.'

No agreement having been reached, near the end of the 6-month period Dallas requested a 2-1/2-month extension of time, claiming that 'great strides have been made towards a mutually acceptable settlement.' The motion was opposed by Fort Worth 'because it has come to the reluctant conclusion that there is no prospect for a voluntary agreement under the present method of conducting negotiations between representatives of the two cities.'

The Board decided it should 'assist' the cities in their efforts to reach a 'voluntary' agreement. By an order issued April 13, 1965, the Board said that, 'if an agreement cannot be reached we will, because of the public interest considerations involved, take appropriate steps to issue a final decision in this proceeding.' Then it said:[14]

Since Fort Worth feels there is no prospect for a voluntary agreement under the present method of conducting the negotiations between representatives of the two cities, we will remand this case to the Examiner who will have full authority to assist the parties in their efforts to reach a definitive agreement, to make any such agreement part of the official record in this proceeding, and to enter an appropriate order terminating the investigation. In the event settlement cannot be effected, the examiner shall reopen the record to receive (1) evidence showing

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[14] Order E-22028.

the areas of agreement and disagreement and (2) further evidence on the question of Fort Worth's ability to finance a regional airport. This will provide the Examiner and the Board with a complete evidentiary record upon which a decision can be based.'

Judge Newmann was sent back to Texas. Before the end of May, Dallas and Fort Worth filed a memorandum of understanding which was unanimously approved by their City Councils. The cities agreed to support a State constitutional amendment to be submitted to the voters in November 1966, legislation enabling a joint airport authority, and a favorable vote by the taxpayers of the two counties to join the airport authority. In the meantime, they undertook to obtain promptly the services of an independent consultant to study and recommend the site, size, and configuration of a regional airport to be located between Dallas and Fort Worth; to acquire land; and to 'proceed immediately to establish an interim organization with power to take initial steps to insure the expeditious planning, financing, and construction of the regional airport, the construction to be completed and operational by 1971 but in no event later than 1973.'[15] As the district court said,

Serving two airports which were so close together resulted in unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities. Happily, the two cities have no [sic] joined hands and are well on the way to the construction of what promises to be he finest airport in the world.

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[15] Memorandum dated May 28, 1965, filed in docket 13959.

* * * This congenial alliance was not exactly the result of shotgun edding [sic] but more than a gentle nudge was provided by the Federal Government's Civil Aeronautics Board.[16]

The interim Dallas-Fort Worth Regional Airport Board was established in September of 1965, and necessary changes in the State law were made by 1967. However, creation of the Regional Airport Authority was defeated in the county elections in June 1967. The two cities therefore contracted and agreed on April 15, 1968, to continue the previously established Regional Airport Board to complete land acquisition and construction and to operate the airport.[17] Each city contributed initial capital and agreed that funds for completion of planning and construction would be obtained by issuance of revenue bonds and not by taxation. On November 11, 1968, the City Councils of the two cities adopted a concurrent ordinance authorizing the issuance of Dallas-Fort Worth Regional Airport joint revenue bonds.[18]

In adopting the ordinance, the cities stated that they had determined that their present airport facilities (Love Field and GSIA) 'are wholly inadequate to meet the foreseeable commercial aviation needs of the citizens of the Cities and the residents and citizens of the entire North Central Texas Region,' and that 'the most effective, economic and efficient means of providing needed airport

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[16] *City of Dallas, Texas v. Southwest Airlines Company, supra* at 1019-1020.

[17] Ex. DRWR-R-982 is the contract and agreement between the cities.

[18] Ex. DFW-R-983 is the ordinance.

facilities is the construction and equipment of a centrally located airport.' The cities gave up their ancient rivalry and adopted 'covenants against competition' in which each agreed, in pursuance of their common purpose, to put aside plans to compete with each other by promoting scheduled service at their solely owned municipal airports, principally Love Field and GSIA. Section 9.5 of the Board ordinance carried out this purpose for 'the optimum use and development of the Regional Airport':

Section 9.5. Competition, Optimum Airport Development.

A. It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Mecham Field own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport. It is further acknowledged and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilitates [sic], as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Mecham Field, of any and all Certificated Air Carrier Services, and to transfer such activities

to the Regional Airport effective upon the beginning of operations at the Regional Airport.

From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of the public safety; (2) in the interest of prudent and efficient operations at the Regional Airport; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole. However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, the Board shall be authorized to establish policies and to make uniformly applicable and nondiscriminatory agreements with air carriers regarding the instances, if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. And in no event, by agreement with air carriers or otherwise, shall limitations or waivers of such covenant allowing a commencement or resumption of Certificated Air Carrier Services at any other airport or airports be adopted if the result thereof would be the reduction in Pledged Revenues below the amount required to satisfy the provisions of Section 9.4 hereof, unless the City (or the Cities in the case of more than one airport) shall also pledge to the payment of all Bonds, by

appropriate official action, such part of the revenues from the airport or airports to which such services are to be transferred, resumed or originally commenced, as will justly compensate the Regional Airport (at rates then in effect thereat for similar services), for the loss of such services and the gross revenues therefrom.

The Board's power under the paragraph shall not include the power to order or direct that specific Aircraft uses be placed at other specific airports unless the owner thereof shall consent to such action or unless such other airport is, or airports are, at the time subject to the control and jurisdiction of the Board.

B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and Facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to the Regional Airport, Love Field, GSIA, Mecham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished,

reduced or destroyed. It is provided, however, that nothing in this paragraph shall be construed to prohibit the promotion and full development of the operation of reasonable Aircraft uses (other than Certificated air Carrier Services) at Love Field, Redbird and Mecham Field, or Aircraft operations of any type at GSIA if the same shall ever be made a part of the Regional Airport. Otherwise, Aircraft uses at GSIA shall not be permitted after the Regional Airport becomes operational.

Revenues were to be obtained from the users of the airport; and, in accordance with the provisions of sections 9.4 and 9.5 of the ordinance, letter agreements were entered into in 1970 by the Dallas/Fort Worth Regional Airport Board and the eight certificated air carriers then serving Dallas/Fort Worth.[19] Each carrier agreed that, after the FAA had officially certified Dallas/Fort Worth Regional Airport as operational, it would move all of its certificated services to that airport and thereafter conduct such services at Dallas/Fort Worth Regional to the extent required by the bond ordinance and that it would, along with the other users of the airport, pay rentals, fees, and charges required to maintain and operate the airport plus 1.25 times the debt-service requirements on the revenue bonds, and an amount equal to any other obligations required to be paid from the airport revenues.[20]

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[19] American, Braniff, Continental, Delta, Eastern, Frontier, Ozark, and TXI.

[20] Ex. DFW-PH-1 is a typical letter agreement. Later signatory carriers executed airport use agreements, an example of which is ex. DFW-PH-2 which sets forth the terms of airport uses and charges and rights of the parties with more particularity.

The carriers also agreed to cooperate in the planning, development, and operations of the airport. Thus, the Airport Board, the FAA, and the carriers developed the master plans for construction and operation of Dallas/Fort Worth Regional Airport and air traffic control for the North Central Texas area. During that time of planning – and, indeed, for 14 years from 1965 to 1979 – the Regional Director of the FAA for the southwest region was Henry L. Newman.[21] According to Mr. Newman, the plans:

> * * * provided for all scheduled air carrier service by large turbojet aircraft to be at DFW and a system of satellite airports to provide adequate service for general aviation pilots. * * * This provides a natural separation to the greatest degree possible of the high performance and generally lower performance aircraft. Procedures were then established to effect this natural separation, thereby resulting in the most efficient use of the airspace with a system which could handle maximum traffic with minimum delays to all concerned. Substantial energy savings result, as well as a substantial reduction in noise. Environmentally the plan is ideal.'[22]

The master plan for Dallas/Fort Worth Regional Airport was a design not only for 'the finest airport in the world' at the time but also for the far future:[23]

> The primary purpose of the Dallas/Fort Worth Regional Airport is to provide an adequate facility to accommodate the ultimate domestic and international air

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[21] Mr. Newman had been employed by the FAA since 1946.

[22] Ex. DFW-917, p. 1.

[23] Ex. DFW-915.

transportation demand of the two cities, their eleven surrounding counties and the states that constitute their tributary market region. The airport is also designed to serve as an international port of entry to the United States.

Of the many factors considered in planning the airport, the most important one was that of air-space capacity. Studies of air-space saturation beyond 1985 indicated that the Dallas/Fort Worth Airport and its eighty nautical-mile airspace could sustain an ultimate annual enplanement demand in excess of 150 million passengers without the delays currently being experienced by other U.S. airports in a saturated condition.

The second basic factor in planning the airport was that of expansion capability. It was determined that even though airspace conditions would be excellent for growth, the airport itself must have the ability to grow. As a consequence the airport is designed to grow as demands for service grow. It is a completely expansible airport from all standpoints. Passenger terminals, runways, road access, cargo hangars and all other facilities can be added as needed. The space (17,520 acres) for such expansion has been acquired and the design of the facilities is such that additions are possible for all conceivable purposes.

Based on aeronautical, technical, economic, social and environmental criteria, airport planners developed a schematic airfield layout responsive to site physiography, weather, navigation standards, air-space conflicts, and compatibility of housing and institutional land-use to noise envelopes. * * * Airfield standards for runway/

taxiway widths, lateral separation, clear zones and other dimensional criteria were designed in accordance with Federal Aviation Administration Manuals. However, at the request of FAA officials, the minimums were upgraded to comply with what the FAA anticipated would be new rules. (For example, the runways were laid out to a width of 200 feet versus FAA requirements of 150 feet.)

The airport layout consists of extensive acreages, including space for six runways, their supporting taxiways, and apron space in the passenger maintenance and cargo areas. The airport layout has been designed to include four primary north-south runways and two secondary crosswind alignments. * * * During initial construction only three of these runways, the two inboard primary north-south alignments and the east crosswind, were provided. * * * The other runways and taxiways will be added to accommodate future demand.

Initially, the north-south primary instrument runways are 11,400 feet long and 200 feet wide. However, at ultimate configuration they will function as inboard takeoff runways capable of expansion of 13,400 feet. The outboard north-south runways will be expandable to 20,000 feet should evolving aircraft technology require such lengths. The crosswind runway is 9,000 feet long and is expandable to 11,000 feet.

A twin crosswind runway was planned for the west side of the airport. The six ultimate runways are designed to provide maximum capabilities for simultaneous takeoffs and landings under instrument conditions. Ultimate

capacity of the airfield has been estimated in excess of 175 IFR operations per hour.

Runway pavement measures 18 inches thick, although apron paving thickness varies with the specific aircraft mix using each terminal. Pavement is designed to permit overlays of up to two million pounds for future aircraft design.

The final airfield design provides 600 foot taxiway and runway separations required to accommodate the wingspan and fuselage length of aircraft anticipated in the future. The taxiways are able to accommodate aircraft flow volumes entering and exiting the runways and the terminal aprons without conflicts and delays. The capacities and turning radius provided by the taxiway geometry also expedites ground aircraft flow and will accept future aircraft types. Taxiways measure 100 feet in width. Concrete pavement thickness of the taxiways range from 15-inches to 18-inches, with provision for structural overlays as needed in the future.

The semi-circular terminals allow aircraft to dock at their gates under their own power, and push out assisted by apron tugs without obstruction from other aircraft. The building configuration and apron layout permit smooth, tangential flow of aircraft. The apron layouts at the terminal modules also enable anticipated future aircraft larger than the present B-747-200 equipment to operate on the same pavement. Apron area for the initial four terminal modules totals approximately 800,000 square yards. * * *

The airfield geometry was conceived to permit complete operations capability under both Category II and

ultimately the demanding Category III capability, with landing and takeoffs under zero ceilings and Runway Visual Range limits of 700 feet. Studies revealed that such weather minimums occur so seldom in the Dallas-Fort Worth region that the Airport can expect 100 percent all-weather capability, barring any major climatological changes.

The arrangement for moving all certificated service to the Regional Airport and employing the local airports for general aviation also created a unique opportunity for FAA to design an area air-traffic system for the future. The kind of traffic problems experienced at other urban-area airports would be avoided by advance planning. Former Regional Director Newman has been 'involved in the organization of the airport system plan and the air traffic system plan since its initiation' and is 'personally knowledgeable of many of the factors that are pertinent.'[24] The FAA participated in the site selection for the airport, and the area airport system plan was 'an FAA project, participated in by all the users of the system.' 'We had input from pilots. We had input from the ATA, and all of our professionals. It was the air traffic controllers, the flight standards specialists, and the engineers that designed and installed the navigation.'[25] At the hearing in this case, Mr. Newman described the air navigation system developed for the Dallas-Fort Worth area:[26]

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[24] Tr., p. 43.

[25] Tr., p. 136.

[26] Tr., pp. 52-54.

This is unique, Problems in other cities have developed as air traffic has grown over airports that were already there. In 1965, when it was decided to proceed with DFW at the insistence of the federal government incidentally and the CAB and the FAA literally forced the cities to build an airport or to get a single airport to serve the air carrier traffic. It provided an opportunity to develop a system without the restrictions and inhibitions that already existed.

FAA had the capability and conducted a simulation study at Atlantic City at its Aeronautical Center at a cost over 4(?) million dollars to develop the ideal air traffic control system for a new airport in a new area, an undeveloped area from the standpoint of aviation activity. * * *

The satellite airports were a very definite consideration in the simulation which was conducted. And the route structures which were laid out are being adopted now other places. What is fundamentally involved are four corner posts at four points around the 40 miles out from DFW.

So that all the traffic, the instrument, the IFR traffic, is funneled over those corner posts and then fed into the satellite airports as well as DFW, and Love Field. It permits for instance, it has almost entirely eliminated holding patterns for the DFW and that area; there is no such holding as far as the satellites. But what it permits is that any delays in the system are taken before they reach the corner posts; in other words they are taken in the en route environment where the aircraft, the jet aircraft, are at the higher altitudes. It saves energy, it reduces noise,

and with the timing the computerized operation at the air route traffic control center, the delays are taken in the en route environment rather than a turnover so that when a pilot is coming into that area he is going to get time over one of these four corner posts. He is advised of what his time is and if it is necessary to slow him down before he reaches there, he is going to do it at the most efficient time for operation of the jet aircraft. The aircraft burn much more fuel at low altitudes than they do at high. It has eliminated all the low approaches coming into that area. * * *

Now this was possible in that area because we were staring [sic] with a new system. We didn't have the restrictions that are already built in in other places. The simulation study in Atlantic City made this possible to reconfigure and come up with an ideal arrangement.

On September 21, 1973, the Civil Aeronautics Board issued an order in which it recited the history of the Dallas/Fort Worth Regional case and said:

In its ultimate development the Dallas-Fort Worth Airport will have six primary instrument runways capable of three simultaneous operations, and a ground capacity of 230 passenger-aircraft gates and 200 all-cargo gates. Under Phase I, which is to be opened this fall, the Dallas-Fort Worth Airport will provide a three-runway layout capable of simultaneous aircraft operations, with a total of 66 passenger gates and 12 cargo gates. Phase I cost is estimated at approximately $700 million.

Stating that 'the new Dallas-Fort Worth Airport will provide an adequate facility to accommodate the air transportation needs of Dallas and Fort Worth and the

surrounding counties the constitute their tributary market-base region,' the Board found that 'the primary purpose and objective of this investigation has been accomplished' and terminated the investigation.[27]

The Board having thus reneged on its part of the bargain to require service at the Dallas/Fort Worth Regional Airport, the parties who had acted in reliance thereon were quite naturally rather upset. As Delta said in answer to the joint petition for reconsideration filed by Dallas and Fort Worth,

The Cities made painful but statemanlike compromises to comply with the Board's determination that the public interest required service through a single airport. They and the carriers relied on that determination and have undertaken the awesome financial responsibility involved in providing a facility which will meet all present and reasonably foreseeable requirements.'[28]

Because of the recent commencement of intrastate jet service at Love Field by Southwest Airlines, that carrier's principal competitors, Braniff and TXI, opposed the Board's requiring all service to be provided at Dallas/Fort Worth Regional, while American, Continental, Delta, and Eastern supported the position of the Cities of Dallas and Fort Worth.

At midnight on January 13, 1974, the air carriers moved their services to Dallas/Fort Worth Regional Airport. GSIA was thereafter closed altogether. For 4 years

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[27] Order 73-9-82.

[28] Docket 13959, answer filed Oct. 10, 1973.

after Dallas and Fort Worth had petitioned for reconsideration of its last order, the CAB remained silent. Finally, on October 13, 1977, the Board served an order noting that the regional airport had been completed and 'has accommodated all certificated carrier flight into the Dallas-Fort Worth area,' tentatively concluding that the issues raised by the petition were 'no longer of concern,' and proposing to deny the petition for reconsideration as 'the most logical course of action at this time.'[29] Only Fort Worth excepted to the proposal; and, on January 12, 1978, the Board served order 78- 1-38 (75 C.A.B. 846) terminating the investigation, stating that 'the harm predicted by the petitioners has failed to materialize and we can foresee no reason why it would materialize in the future.' The Board's crystal ball was partly cloudy that day. Within months the reactivation of Love Field as an airport for interstate operations had arisen as an issue in at least five separate cases before the Board.

In the meantime, the Congress had before it proposals to amend the Federal Aviation Act of 1958. Among other things the Airline Deregulation Act that was finally enacted changed the factors listed in section 102 that Congress requires the Board to consider as being in the public interest and in accordance with the public convenience and necessity. In paragraph (6) of section 102(a), Congress declared to be in the public interest and in accordance with the public convenience and necessity in interstate air transportation.

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[29] Order 77-10-36.

The encouragement of air service at major urban areas through secondary or satellite airports, where consistent with regional airport plans of regional and local authorities, and when such encouragement is endorsed by appropriate State entities encouraging such service by air carriers whose sole responsibility in any specific market is to provide service exclusively at the secondary or satellite airport, and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

On September 21, 1978, this amendment was discussed extensively on the House floor and explained by Congressmen Wright, the Majority Leader of the House; Anderson, the Chairman of the subcommittee that drafted the Act; Snyder, the ranking minority member of that subcommittee; and Harsha, the ranking minority member of the parent Committee on Public Works and transportation:[30]

Mr. Wright. Mr. Chairman, I take this time in order that we may make some legislative history that will be clear to any and all who may undertake to administer this act.

'I refer to the new section 8 which has been inserted in the bill by the amendment offered by the gentleman from Illinois (Mr. Fary). It refers to the encouragement of air service in major urban areas through secondary or satellite airports where consistent with regional airport plans of regional and local authorities. I emphasize the

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[30] 124 Cong. Rec. H10293-10294 (daily ed. Sept. 21, 1978).

operative phrase, 'where consistent with regional airport plans of regional and local authorities.'

That is a concept which I certainly support. Situations and local desires vary widely throughout the country, and the needs and priorities of local authorities must by all means be respected. I know there are areas in the country such as Chicago and other localities where the local and regional authorities desire to get more service at satellite airports. There are, however, situations in this Nation which are exactly the reverse, and my purpose here is to give the Members one such illustration to make it abundantly clear to all for all time to come what this means with regard to them.

As the members of the committee are aware, I am sure, the cities of Dallas and Fort Worth, at the urging of the CAB, formally agreed that Love Field, as well as Mecham Field, the first in Dallas and the second in Fort Worth, would be closed to interstate and foreign flights as a part of their agreement to build and invest in the Dallas-Fort Worth Regional Airport. Based on that commitment, well over $500 million has been spent to build and develop the Dallas-Fort Worth Regional Airport.

As I understand it, the 1968 Regional Airport Concurrent Board Ordinance of the two cities specifically contains a regional airport plan which absolutely precludes the use of Love Field or Mecham Field for interstate or foreign flights. I am insistent that this decision shall be respected and that nothing be done to place it in jeopardy.

Now, if the CAB were to be allowed nevertheless to certificate any service into Love Field, let us say, then

there would be a very serious concern that it could become a major air carrier airport once again, and that service would be drawn away from the Dallas-Fort Worth Airport into which all the cities' moneys and their futures have been pledged, to the serious inconvenience of Fort Worth passengers and also to the serious financial detriment of the cities of Dallas and Fort Worth and their ability to pay off the Dallas-Fort Worth Airport bonds. I want to leave no possibility that any future administration or board member could misconstrue any language in this bill as encouraging or permitting such a travesty.

Mr. Chairman, I refer once again to the language: The encouragement of air service at major urban areas through secondary or satellite airports where consistent with regional airport plans of regional and local authorities.

I should like to ask the manager of the bill, the gentleman from California (Mr. Anderson): Am I correct in understanding that if the Dallas-Fort Worth Regional Airport Board or the cities inform the CAB that any interstate service to Love Field is not in accordance with the plan of the 1968 Board Ordinance, and that they do not desire it, then the CAB could not certificate any such service to Love Field or to Mecham Field?

Mr. Anderson of California. Mr. Chairman, will the gentleman yield?

Mr. Wright. I yield to my friend, the gentleman from California.

Mr. Anderson of California. Mr. Chairman, my understanding of the language is as the gentleman stated it.

Mr. Wright. Mr. Chairman, I thank the gentleman.

Mr. Goldwater. Mr. Chairman, will the gentleman yield?

Mr. Wright. Yes, I yield.

Mr. Goldwater. Mr. Chairman, is it the purpose of this colloquy to make a point that the service offered between Fort Worth and Dallas shall only be at the Fort Worth-Dallas International Airport?

Mr. Wright. In regard to interstate and foreign flights, yes. Mr. Chairman, the purpose of the colloquy is to make abundantly certain that nothing whatever in this bill shall interfere with the determination of the cities of Dallas and Fort Worth, since they invested $500 million of their futures in the bonds that will be guaranteed by their citizens upon the premise and upon the decision, and upon the encouragement of the CAB, that the Dallas-Fort Worth Regional Airport shall be the only airport to serve interstate or foreign flights.

The Chairman. The time of the gentleman from Texas (Mr. Wright) has expired.

(By unanimous consent, Mr. Wright was allowed to proceed for 3 additional minutes.)

Mr. Goldwater. If the gentleman will yield further, it is not the gentleman's intention that we should abandon or destroy Love Field or perhaps other fields in the surrounding area, is it?

Mr. Wright. Let me say to the gentleman that no commentary that I have made could lead to that conclusion. The cities of Dallas and Fort Worth, in their mutual, joint efforts, decreed that, in exchange for their putting huge sums of money into the development of this regional airport, there will be no interstate or foreign flights from any of the other airports in that region. Everybody is happy with that. I just want to make clear that nobody misreads anything in this bill as an encouragement to put competing flights in interstate commerce into any other airport, because it would be seriously detrimental to the citizens and the taxpayers of the area:

Mr. Goldwater. I think it was abundantly clear. But I am certain that the gentleman recognizes that aviation travel, the evolution aspect of it, with commuter service and short-haul coming into being, that at some point in time, as long as it is compatible with the regional plan, perhaps Love Field, and other fields, might become once again an attractive place to land. It is not encouraging by the construction of another field.

Mr. Wright. I think what the gentleman fails to appreciate is that presently there are short-haul intrastate flights and many private flights going into Love Field and into Mecham Field. There will be a continuing need for those airports. Mecham Field is currently undergoing an expansion program. We have no objection to that. What we would seriously object to would be any act on the part of the CAB which certificate any interstate or foreign flights into any place other than Dallas-Fort Worth Airport to serve those two cities.

Mr. Snyder. Mr. Chairman, will the gentleman yield?

Mr. Wright. I yield to the gentleman from Kentucky.

Mr. Snyder. I thank the gentleman for yielding.

Mr. Chairman, I want to say this, in support of Chairman Anderson's response to the gentleman from Texas. During the full markup – and I mentioned this earlier – the gentleman from Illinois (Mr. Fary) offered an amendment similar to the one that the gentleman makes reference to today. And we recognized their problem at Midway. But we were also well aware of the situation at Love that the gentleman from Texas has laid out here, and our agreement with him was that we wanted to try to help his situation but under no circumstances did we want any language that might be interpreted to adversely affect the situation which the gentleman from Texas just described. It was with that understanding that the staff developed the language that the gentleman is making reference to and which we have earlier adopted today, and it was with that understanding, at least on this side of the aisle, that we were acceptable to the amendment.

I hope that clarifies my understanding.

Mr. Wright. Mr. Chairman, I will say to the gentleman that I am grateful to him for that clarification.

The Chairman. The time of the gentleman from Texas (Mr. Wright) has expired.

(On request of Mr. Harsha and by unanimous consent, Mr. Wright was allowed to proceed for 1 additional minute.)

Mr. Harsha. Mr. Chairman, will the gentleman yield?

Mr. Wright. I yield to the gentleman from Ohio.

Mr. Harsha. I thank the gentleman for yielding.

Mr. Chairman, I would also like to associate myself with the remarks of both the chairman of the subcommittee and the ranking minority member of the subcommittee. When the gentleman from Illinois offered his amendment initially. I was the one who raised the most objections to it, because at that time it was so worded that it may have impacted on some litigation that was presently going on. So as a result of that, I met with the gentleman from Illinois and two or three other members from Illinois and the members of our committee. With the assistance of the staff, we worked out what we felt was an acceptable amendment, recognizing the problem with Midway and O'Hare Airport and the problems there that those members from Illinois were concerned with. While at the same time I made a commitment with my good friend, the gentleman from Illinois, relative to this amendment, I also believe I had an understanding that it in no way was to have a detrimental effect on the Fort Worth-Dallas Airport.

That is my understanding of the legislative history of it, and I hope it will be so interpreted.

Mr. Wright. I thank the gentleman, and I am pleased and satisfied with the response.

Later, Congressman Johnson, the Chairman of the Aviation Subcommittee, explained:

The purpose of this amendment is to direct the CAB to take appropriate action to stimulate air service at so-

called secondary and satellite airports in major metropolitan areas – such as Chicago's Midway Airport, Baltimore-Washington International Airport, Oakland, Calif., Newark, N.J., and Toledo, Ohio – when such increased use is endorsed by local, regional, and State authorities.[31]

Five weeks after the conference report and over 2 weeks after the Act became effective upon President Carter's signing it, Senators Kennedy and Cannon inserted in the Congressional Record a question and answer apparently contradicting the House explanation.[32] Later, Congressman Wright testified as a witness in this case in March 1979; and letters from Congressman Harsha and from Richard J. Sullivan, Chief Counsel of the Committee on Public Works and Transportation, were accepted as statements of position under rule 14. All of these statements reaffirm the House view.

The Texas Aeronautics Commission in its brief in docket 34582 and Southwest Airlines in its brief herein both cite court cases that have persuaded the judge that all the post hoc interpretations cited in the preceding paragraph must be disregarded by the Board. The court decisions are very much to the point:

A legislature speaks through statutes, and, in cases where the statutes require interpretation, through committee reports and debates. No member of a legislature, outside the legislature, is empowered to speak with authority for the body. If he may testify voluntarily, other members of his legislative body with different views or

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[31] 124 Cong. Rec. H13447 (daily ed. Oct. 14, 1978).

[32] 124 Cong. Rec. S19559 (daily ed. Nov. 9, 1978).

different recollections may be summoned to give their differing versions. The debate, which, so far as the law-making body is concerned, should have been ended by the enactment of the statute, would be transferred to the court, with disturbing possibilities of embarrassment and friction.[33]

Statements made by legislators in debate can be a part of the legislative history which guides courts in statutory construction. * * * On the other hand, statements made by a legislator after enactment of a statute and not a part of the records of the legislative body are entitled to little or no weight at all. * * * Such statements are not offered by way of committee report and are not offered for response by other members of the law-making body. The intent which is helpful in interpreting a statute, is the intent of the legislature and not of one of its members. For purposes of statutory construction, a legislative body can only speak through a statute, with the words that are used in light of the circumstances surrounding its enactment.[34]

The opinions of some members of the Senate, conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor of the Senate and the House, are not to be taken as persuasive of the Congressional purpose.[35] The reports and explanations

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[33] *National School of Aeronautics v. United States*, 142 F. Supp. 933, 938 (Ct. Claims 1956).

[34] *Epstein v. Reeor*, 295 F. Supp. 214, 216 (N.D. Calif. 1969), *aff'd* 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970).

[35] *U. S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942).

given by committee members in charge are appropriate guides to ascertain the meaning and purpose of the law-making body,[36] and later statements are entitled to little or no weight.[37]

In light of the circumstance surrounding enactment of section 102(a)(6), the language of the statute itself, and the undoubted existence of the regional airport plans of the regional and local authorities, it seems clear that the Congress has forbidden the Board to certificate any future interstate air service at Love Field contrary to those airport plans. This is the position taken by the six Dallas/Fort Worth Parties[38] and their supporters.[39]

Nevertheless, Air Florida (one of 13 applicants herein) urges the Board to permit it to use Love Field in its Dallas/Fort Worth-Florida service. Air Florida is supported principally by the intervenor Southwest Airlines, who is the applicant in docket 34582, which has been heard by Judge Kane.[40] They argue that section 102(a)(6) is only 1 of 10 factors that the Board should merely

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[36] *Dupier Co. v. Deering*, 254 U.S. 443 (1921).

[37] *?? v. Colloway*, 526 F.2d 246 (8th Cir. 1975); *Sperling v. United States*, 515 F.2d 465 (3d Cir. 1973); *United States v. Mine Workers*, 330 U.S. 258 (1947).

[38] The City of Dallas, the City of Fort Worth, the Dallas Chamber of Commerce, the Fort Worth Chamber of Commerce, the North Texas Commission, and the Dallas Fort Worth Regional Airport Board.

[39] American, Eastern, Frontier, Ozark, DOT, Neddy, Wright, Harsha, and Sullivan, the latter three of which are disregarded, as noted previously.

[40] Others supporting Air Florida are BDA, BCP, TAC, and San Antonio. The other parties took no position.

'consider' 'among other things' in determining whether a route award is consistent with the public convenience and necessity, and leap from there to the conclusion that local authorities cannot 'veto' a Board decision to authorize service at a satellite airport.

Clearly, paragraph 6 is 1 of 10 paragraphs in which Congress set forth factors that the Board is required to consider as being in accordance with the public convenience and necessity. Just as clearly, it does not require that the Board encourage service at satellite airports in every case. Indeed, the 'encouragement' is limited by the statute itself to those cases where such encouragement is 'consistent with regional airport plans of regional and local authorities.'

As Air Florida says, the Board and the courts have held in the past that one or another of the 'factors' listed in section 102 may tip the scales one way or another in various cases. In some recent Board cases, such as those involving Midway and Oakland airports, the encouragement of the use of those satellite airports was the overriding factor considered; the cases were instituted for the specific purpose of certificating service at those satellites, and at the urging of local and regional authorities.

Here, on the contrary, paragraph 6 was injected into a broad case involving service between Dallas/Fort Worth and various points in Florida by 1 of 13 applicants, and service at the satellite airport is not 'consistent with regional airport plans of regional and local authorities.' There is no denying the existence of those airport plans. Yet, under the Air Florida argument, the Board would be

required to encourage service at Love Field by Air Florida, regardless of those regional airport plans, and contrary to its own argument that section 102 does not require the Board to do anything.

The 'balancing act' has already been done as to the policy factors in this case, and the Board has authorized service by the various carriers between Dallas/Fort Worth and the Florida points. One applicant in this case, Air Florida, and one in docket 34582, Southwest, argue that the Board must adopt their views and may not look at the legislative history, because the 'statute is plain and unambiguous on its face.' It certainly appears to the judge to be plain and unambiguous, but these same parties are the ones who would have the Board read out of the statute the plain and unambiguous language.

The lengthy explanations on the House floor during the debate upon this specific section of the bill also 'make it abundantly clear to all for all time to come what this means.' Where the statutory meaning is clear, legislative history cannot serve to reverse that clear meaning, as Southwest says. Here, the legislative history is quite in accord with the plain words of the statute. The Congressmen recognized that 'situations and local desires vary widely throughout the country,' and Love Field was given as a specific instance where the Board 'could not certificate any such service.' 'I want to leave no possibility that any future administration or board member could misconstrue any language in this bill as encouraging or permitting such a travesty.' 'What we would seriously object to would be any act on the part of the CAB which certificate any interstate or foreign flights into any place other than Dallas-Fort Worth airport to serve those

two cities.' The drafting process was described, and the subcommittee was 'well aware of the situation at Love' and 'under no circumstances did we want any language that might be interpreted to adversely affect the situation'; 'it in no way was to have a detrimental effect on the Fort Worth-Dallas airport.' Indeed, the only remarks relating to Love Field that may be contrary in the Congressional Record are the afterthoughts of Senators Kennedy and Cannon, which must be disregarded by the Board, as discussed previously.

If the Board should now take it upon itself to certificate interstate service at Love Field, it would simply fly in the face of the clear congressional intent. The remedy for those who do not like the statute as it is is not to twist it out of reason, but to petition the Congress to change it.

The fact is that, because paragraph 6 has been kept isolated from the other nine public interest factors in this case, Air Florida and Southwest claim that the Board has a sacred duty to enforce 'encouragement of air service at major urban areas through secondary or satellite airports,' no matter what the local and regional authorities may present to the contrary. It is Air Florida and Southwest who seek to make section 102(a)(6) an imperative rather than 1 of 10 enumerated factors that the Board must consider as being in accordance with the public convenience and necessity, among other things.

On the other hand, the six Dallas/Fort Worth parties ask the Board simply to read the words of the statute in their context and not to do what the Congress, from whom the Board derives all of its authority, has clearly told the Board not to do. In that context, it is clear that

Congress wished to give its approval to the Board's efforts to accommodate the Chicago-area authorities, who wanted to revitalize Midway Airport, for whatever reasons they may have had. Congress did not set forth the reasons why, as to Midway and the like, but left that to the local authorities. However, they did set forth the reasons why not, in affixing the limitation on such encouragement by the Board. Yet, Air Florida and Southwest would have the Board believe that the Board must encourage such use where the local authorities want it done and ignore the local authorities where they do not want it done.

In support of their arguments, Air Florida and Southwest cite several court cases involving Southwest's rights to serve Love Field in intrastate air transportation. Of course, as the courts said, the CAB had no jurisdiction over purely intrastate air transportation, nor over airports or cities, and the courts made clear that the cases were no precedent as far as interstate air transportation is concerned. More important, however, all those cases were decided before enactment of the Deregulation Act, in which Congress has delineated in this particular instance the demarcation between the use of Love Field and Dallas/Fort Worth for interstate air transportation. Congress has said that local and regional airport planning is in the hands of those who have made the plans and paid the price, not the Federal CAB. Cases decided before the Deregulation Act, particularly dealing with intrastate transportation, are simply not applicable to situations arising in interstate transportation after the enactment of the Act.

The Air Florida group use the word 'veto' to describe the congressional recognition of the primary interest of local and regional airport owners in planning for the use of their local airports. There is, of course, no veto power expressed or intended; the Congress has merely limited its own policy that use of satellite airports should be encouraged to those cases where local, regional, and State authorities have endorsed such encouragement. Where the airport plans of local and regional authorities do not include increased certification at satellite airports, the congressional policy is that the Board shall not encourage such use and certainly shall not force its whim upon the local authorities. If the statute does not mean this, then it has no meaning at all. Congress is not given to enacting absurdities.

The Air Florida group would in fact have the Board veto the act of Congress as well as the local ordinance. The Board cannot, of course, engage in such ultra vires activities as determining the legality or constitutionality of laws. The Board is a congressional agency and exercises only that power which is delegated to it by the Congress. It has no independent constitutional authority to do otherwise.

Yet, Air Florida's supporters would apparently argue that the Congress itself has acted in an unconstitutional manner. And BCP raises the specter of conspiracy in restraint of trade and abuse of process. These spurious arguments do no credit to those who put them forward. Congress and two Federal agencies, the CAB and the FAA, have put their imprimatur on the 'reasonable separation' of kinds of air traffic to be permitted at Dallas/Fort Worth Regional and its satellites and hence would

become coconspirators with the accused, the six Dallas/Fort Worth parties and the air carriers who support them, not to mention the U.S. Department of Transportation, which reads the statute as it is plainly written. Aside from the fact that it is not the Board's business to rule upon the legality of the statute it is directed to administer, the Congress cannot be accused of conspiracy when it enacts laws within its purview, the purposes of which are writ so large in the history of this particular controversy.

It is, after all, Congress which holds the purse strings and has the responsibility to see that public funds are expended in a rational way, in this instance for a national air transportation system to meet the present and future needs of the nation's commerce. The taxpayers of the United States do have quite a considerable stake in Dallas/Fort Worth Regional Airport. Air Florida and Southwest would have them invest much more to modernize Love Field, which Southwest's own witness in response to his own counsel called, 'a rundown facility' with 'very poor radar,' whereas Dallas/Fort Worth Regional has 'the very finest electronic equipment is in place, with a beautiful facility for their use.'[41] That same witness had attended some of the hearings in the Dallas/Fort Worth Regional Airport case and 'learned through osmosis' that 'the CAB told Dallas-Fort Worth that, either get together, decide on a regional airport, or we'll do something else,' and that the 'arm-twisting' was by both the CAB and the FAA.[42]

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[41] Docket 34582, tr., pp. 398-399.

[42] Docket 34582, tr., pp. 449-450.

The Air Florida parties argue that the airport plans that resulted from that arm-twisting are somehow wrong, that circumstances are different now, and Love field must be reactivated by Board fiat to relieve congestion in the Dallas/Fort Worth area. Not only is the planning of airports again outside the Board's jurisdiction, but the facts are not as alleged. No need whatever has been shown for traffic relief at Dallas/Fort Worth Airport by increasing traffic at Love. Dallas/Fort Worth, as described in detail previously, was designed for future expansion capability, has all the latest traffic-control equipment and facilities, and can handle all foreseeable traffic growth. According to Mr. Newman, 'it is the only major airport in the country that has got excess capacity.'[43]

In fact, the overwhelming evidence in both this case and in docket 34582 indicates that current capacity at Dallas/Fort Worth Regional Airport is limited chiefly by operations at surrounding airports – the main problem being caused by Love Field. For example, phase I of a recent FAA-sponsored study of capacity at Dallas/Fort Worth Regional found that:

Owing to the location and volume of air traffic generated at east-side satellite airports, current DFW runway capacity can be significantly reduced at any given time. * * * Operations at Love Field are a prime cause of this constraint, due to the volume and nature of air traffic generated there.

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[43] Tr., p. 118.

Accordingly, although current DFW runway capacity exceeds air traffic demand, aircraft delays are caused by constraints to the use of maximum available capacity.

In the future, DFW capacity can be increased significantly through the development of additional runways and the implementation of ATC Engineering & Development improvements. However, unless current constraints to DFW runway capacity are relieved, additional investment in runways way [sic] still not provide the capacity required to efficiently accommodate future air traffic demand volumes.

A determination of the cost of aircraft delay and excess fuel consumption caused by current constraints to DFW capacity will be made in Phase II of the Airport Improvement Program.[44] Love Field operations are now 91.5-percent general aviation; the only scheduled operations are intrastate and air taxi operations, in accord with the airport plans. But Southwest's intrastate flights with high-performance aircraft have increased dramatically in the last year, while other aviation activity was also growing. The fact is that increasing high-performance aircraft operations at Love Field would not lessen, but would aggravate air traffic congestion and potential safety problems in that terminal area.

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[44] Ex. DFW-903A, docket 34582. Dallas/Fort Worth Airport Improvement Program, phase I report: capacity analysis, final draft, April 1979, prepared by Dallas/Fort Worth Airport Board, Airlines Service Dallas/Fort Worth, Air Transport Association, and Federal Aviation Administration. This is one of a continuing series of FAA studies at selected airports. Dallas/Fort Worth was not on the original list of airports, because its capacity exceeds demand. Tr., pp. 116-118.

Air Florida's proposed service in this case would involve entirely new operations at Love Field, since Air Florida does not now serve Dallas/Fort Worth. In addition, Southwest in several cases is seeking new authority between Love Field and other interstate markets, and a number of carriers who do not now serve Dallas/Fort Worth have recently been authorized by the Board or its judges to serve that area without designation of the airport to be served. Even if no carrier now using Dallas/Fort Worth Regional Airport moved any of its operations to Love Field, reactivation of Love Field in these cases would increase congestion, noise, delay, fuel usage, air safety problems, and costs to users and taxpayers. As witness Newman said, 'The use of Love Field by large turbojet aircraft destroys the basic element of the plan. The mix of this traffic in the highly congested area east of DFW with Navy Dallas, Redbird, Love Field, and Addison is the basic thing the plan was engineered to avoid.'[45]

The airport plan is basic to this case and to the statutory scheme. It is important to remember that the limitation in section 102(a)(6) applies to future acts of the Board. It is not retroactive; no current operations at Love Field will be required to be moved from there, even though what was formerly intrastate transportation may have, by action of law, become interstate transportation. Neither Southwest's operations nor those of previously exempt air taxi operators are affected. But no further encroachment on the plan will be countenanced. The statute incorporates the status quo in order to protect the

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[45] Ex. DFW-917, p. 1.

reasonable separation of airport use insisted upon by the Federal Government, the investment of local and Federal taxpayers and the bondholders, the citizens who must bear the noise, and the passengers and shippers who are affected by delays and fuel waste and who pay the certificated carriers' costs.

Since Mr. Newman and other current and past FAA employees are principally concerned with airspace problems in the crowded sky around Love Field, which would be exacerbated by increased operation of high-performance aircraft there, rather than with whether those aircraft are engaged in interstate or intrastate service, the Air Florida group argue that separation of uses based on an interstate-intrastate dichotomy is unreasonable, discriminatory, a burden on interstate commerce, and a violation of other provisions of the Federal Aviation Act. The arguments center around the Federal-preemption section (105(a)(1)), the reserved proprietary rights provision (sec. 105(b)(1)), and the exclusive-use prohibition (sec. 308(a)).[46]

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[46] The pertinent parts of these three sections read as follows:

> 'Sec. 105(a)(1): Except as provided in paragraph (2) of this subsection [excepting intra-Alaska operations], no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this Act to provide interstate

These provisions simply have nothing to do with this case, which is concerned not with local rights but with a statutory limitation upon the Board's authority to certificate service to one of several available airports at a particular point. The arguments and assertions of Federal preemption and proprietary rights are irrelevant; nor is there any exclusive use.

Forced by CAB and FAA, Dallas and Fort Worth agreed in their ordinance for the 'phase-out at Love field, Redbird, GSIA and Meacham [sic] Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.' Certificated air carrier services were defined as scheduled CAB-certificated interstate and foreign service and TAC-certificated intrastate service. Air taxis, which were exempt from certification by the Board and which by Board definition operated small aircraft, could continue to operate

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transportation.

* * *

'Sec. 106(b)(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

* * *

'Sec. 308(a) * * * There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.'

at satellite airports,[47] as could such nonscheduled interstate or intrastate operations as training, positioning, or maintenance flights, charter flights, and general aviation operations. The satellites were thus intended for use principally as general aviation airports; and, as noted previously, 91.5 percent of operations at Love Field are general aviation.

It is not up to the Board to question the reasonableness of that classification, which was, after all, brought about by its own actions. As the Court of Appeals said:[48]

In consequence of federal Civil Aeronautics Board hearings commenced in 1962, the cities were given to understand that, if they were unable to agree within a reasonable time on a single port for interstate air service to the Dallas-Fort Worth area, the CAB felt obliged to designate one.

The handwriting being thus upon the wall, the cities found themselves, after all, able to agree. In due course, and with CAB blessing and encouragement, they constructed a new airfield and persuaded all interstate, CAB-certificated carriers then serving the area to agree to move their services there.

The courts in the Southwest cases found that the Board's orders in the Dallas/Fort Worth Regional Airport case did not apply to intrastate air transportation, over

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[47] Ordinance, p. 5; ex. DFW-R-983, p. 6.

[48] *City of Dallas, Texas v. Southwest Airlines Co.*, 494 F.2d 773, 775 (5th Cir. 1974), *affg*, 371 F. Supp. 1015, rehearing denied, 496 F.2d 1407 (1974), *cert. denied*, 419 U.S. 1079 (1974).

which the Board had no jurisdiction and directed Dallas to permit Southwest to operate intrastate commuter flights at Love Field in competition with operations by air taxis and CAB-certificated carriers within the State. The ordinance was found to unjustly discriminate specifically against Southwest and to grant an exclusive use by excluding only Southwest's intrastate service from Love Field while permitting those other intrastate services. The courts did not question the validity of Board orders nor the Dallas/Fort Worth ordinance as they applied to the phase out of interstate certificated scheduled service at Love Field.

As noted previously, those cases have no application to the present situation, either factually or legally. There is no competition for certificated scheduled interstate service at Love Field, and nobody is being discriminated against nor excluded from a use permitted to others. Nor is there any burden on interstate commerce, with a futuristic airport available that was built for the specific purpose of accommodating certificated interstate scheduled service. Air Florida and Southwest would now have the Board change that classification just for their benefit. But by the recently enacted Deregulation Act, Congress has specifically prohibited the Board from doing so. The Board's authority is limited by Congress, not by Dallas and Fort Worth.

The question here is really very simple: whether the Board has authority to open Love Field to new interstate certificated service, which has not been permitted previously. The Congress has clearly said no. Yet, BCP imputes ulterior motives to the Dallas/Fort Worth Parties for 'resorting to the Board.' BCP's lack of knowledge of the

entire history of this case is thus revealed. Dallas and Fort Worth did not 'resort' to anything: they followed the statutory directive in response to Air Florida's proposal to institute interstate service at Love Field by informing this tribunal of the long-existing airport and air traffic plans for the north Texas region. That they must do in order to establish on the record that paragraph 6 bars the Board from certificating such service. The statute grants to the regional and local authorities – in this case the Dallas/Fort Worth Parties – the right to make their own determination, pursuant airport planning, as to which of several local airports they own and operate shall serve interstate air carriers. As DOT says on brief in docket 34582, 'Congress has adequately registered its intent that interstate service to this area be provided only through DFW- airport.' The Board is bound by that legislative directive.[49]

The Dallas/Fort Worth supporters argue additionally that the Board is equitably estopped from changing its longstanding policy because the cities and carriers have relied on that policy in good faith to their detriment. Fort Worth, of course, closed GSIA altogether. American says:[50]

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[49] In May, while this decision was being written, the Texas legislature passed a bill that would have withdrawn from Dallas its recognized authority to restrict service at Love Field under its airport plans for flights of 600 miles or less. (S.B. 772.) The bill was vetoed by the Governor of Texas on June 12, 1979, leaving the local authorities with their preexisting mights. The bill would not have affected this case in any event since the Dallas Fort Worth- Florida routes are all over 600 miles.

[50] Brief, p. 3.

Absent extraordinary factors of justification, the Board cannot abandon its commitment to the single airport concept at Dallas/Fort Worth just five years after the facility, constructed at a cost exceeding $1 billion, opened for business. No such factors are present here. And Frontier says:[51]

> * * * the Board cannot now deny its responsibility for the creation of the Regional Airport and cannot participate in actions which will undermine its successful operation. To do so by granting Southwest's application to institute interstate service at Love Field would be morally reprehensible, and nothing short of disgraceful behavior by a government agency.

Dallas/Fort Worth witness Downey, on cross-examination,[52] spoke of 'the years of time and the millions of dollars that have been spent' as well as 'all of the genius that has been applied in trying to plan for a rational air system in the metroplex.' And, later, he said:

> You've got problems of air space. You've got problems of city planning. You've got economic problems. You've got environmental problems. * * * We're talking about a major planning for a major area in the United States of air transportation that must have a fully contained plan. It must operate in accordance with the rules of the road. Otherwise, like any city whose planning goes to pot, it's going to deteriorate and become of no value to us whatsoever.

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[51] Docket 34582, brief, p. 7.

[52] Tr., pp. 300, 317.

The parties cite various court decisions on the subject. For example, the District of Columbia Court of Appeals has held that a Federal agency may change its policy, but it must give due consideration to equities arising out of commitments based on its previous rulings.[53] The court further says:[54]

* * * estoppel – preventing the alteration of prior practices as regards certain parties – will only be worked against the government for compelling equitable considerations. Previous CAB practice will only be determinative here if it had been such as to have created a pattern of behavior on which industry members justifiably had come to rely.

Without the 'cornerstone requirement of reasoned decision making,' 'administrative litigants and the public generally would be set adrift on a potential sea of unconscious preference and irrelevant prejudice.'[55] The agency has a right to modify or overrule established precedent and is not bound by rigid adherence to prior rulings, but it must be faithful and not indifferent to the rule of law. The Court of Appeals for the 10th Circuit says:[56]

The rule of law is intended to eliminate the appearance as well as the reality of arbitrariness, and if the

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[53] *Consolidated Gas Supply Corporation v. F.P.C.*, 520 F.2d 1176 (D.C. Cir. 1975).

[54] *British Caledoman Airways, Ltd. v. C.A.B.*, 584 F.2d 982, 986 (D.C. Cir. 1978).

[55] *Columbia Broadcasting System, Inc. v. F.C.C.*, 454 F.2d 1018, 1025 (D.C. Cir. 1971).

[56] *Id.* at 1027. *See also C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir. 1974).

public's faith in its administrative agencies is to be maintained, it is imperative that these agencies act in a wholly rational, logical fashion, completely free from even the appearance of bias, prejudice and improper influence.

And the Board itself recently invoked equitable principles with respect to a mere exemption:[57]

[W]e do not consider it equitable or consistent with the public interest to revoke the exemption granted TWA in the Orlando-Philadelphia and Minneapolis/St. Paul St. Louis markets. TWA has changed its position in reliance on the Board's order, has invested resources in its announced new services in these markets, and would be injured by the abrupt termination of its authority. If the order was justified when issued – and we think it was – Northwest's subsequent showing should not induce us to change our mind after TWA has acted in reliance. To revoke the exemptions now would penalize TWA without cause, and would deter other carriers from relying on the Board's grants of exemption authority.

American claims that the Board is bound to apply the same equitable principles here:[58]

The Dallas-Fort Worth Regional Airport was built in direct reliance on Board policy. The cities and affected carriers expended substantial resources in implementing that policy, and the carriers committed themselves by

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[57] *American et al., Unused-Authority Exemptions*, 80 C.A.B. 485, 490 (1979).

[58] Brief, pp. 20-21.

81 C.A.B. 798, 1979 WL 21406 (C.A.B.)

81 C.A.B. 798, 1979 WL 21406 (C.A.B.) [sic]

contract to use and support the new airport. They are entitled to the policy's continuation, absent an extraordinary showing that a reversal is required. There are certainly no circumstances presented now that could justify such a change.

Although the arguments in favor of equitable estoppel are probably correct in this case, there is no need to decide that question. The Board has already been estopped by an Act of Congress.

Nor is there any need to rule on the arguments of Dallas/Fort Worth and other parties that further environmental analysis is required by the National Environmental Protection Act and the Board's regulations to assess the cumulative impact before interstate service may be authorized at Love Field. Such service may not be authorized by the Board. It has already been ruled in part I of this initial decision that the certification of all the applicants for service at Dallas/Fort Worth Regional Airport did not constitute a major federal action significantly affecting the quality of the human environment, and the Board has affirmed that decision.

The application of Air Florida to use Love Field in interstate service will be denied. An appropriate order is attached.

[The proposed order referred to here is omitted since it is printed *supra*.]

Supreme Court, U.S.
FILED
MAY 22 2000
CLERK

No. 99-1739

In The

Supreme Court of the United States

DALLAS-FORT WORTH
INTERNATIONAL AIRPORT BOARD,

Cross-Petitioner,

v.

THE UNITED STATES
DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the Fifth Circuit's decision upholding the Department of Transportation's interpretation that the Wright Amendment commuter airlines exception allows single-ticket service from Love Field to points beyond the Love Field Service Area, *if* a first leg is flown intrastate on a 56-seat aircraft that then connects at a Texas airport for a second-leg, long-haul flight to virtually any city in the world, conflicts with the opinion of this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the construction of federal statutes and with the decision of the D.C. Circuit in *Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988), that Love Field should be maintained as a "short-haul" airport?

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RULE 29.6 STATEMENT

Respondent Southwest Airlines Co. is a corporation whose stock is publicly traded. It has no parent company and no publicly traded company owns 10% or more of its outstanding stock.

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RESPONSE OF SOUTHWEST AIRLINES CO. TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent Southwest Airlines Co. ("Southwest") respectfully makes this Response to the Cross-Petition for a Writ of Certiorari filed by the Dallas-Fort Worth International Airport Board (the "DFW Airport Board"). Southwest files its Response pursuant to Rule 12.6 of this Court to support the request of Cross-Petitioner for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on the second question presented in the Cross-Petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 202 F.3d 788, and is reproduced at Appendix A to the Petition for a Writ of Certiorari previously filed by the City of Fort Worth in the related Cause No. 99-1462. (FW Pet.App. 1-52). The Department of Transportation's Declaratory Order is publicly available at 1998 WL 911847 (D.O.T.). That Order, and the DOT's Order on Procedural Motions, are reproduced at Appendices B (FW Pet.App. 53) and C (FW Pet.App. 147), respectively, to Fort Worth's Petition for a Writ of Certiorari.

JURISDICTION

The court of appeals entered its judgment on February 1, 2000, and issued a revised opinion on February 24, 2000 (FW Pet.App. 1). No petition for rehearing has been

filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980) [the Wright Amendment]; and Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) [the Shelby Amendment]. They are set forth in the appendix at 1a.

STATEMENT OF THE CASE

This proceeding is the latest manifestation of a dispute over the proper roles of airports in the Dallas-Fort Worth metropolitan area that has taken place over the course of nearly three decades, in numerous forums – federal and state courts, the Texas Aeronautics Commission, the Texas legislature, the Congress, the Civil Aeronautics Board and the U.S. Department of Transportation. The present case arises out of Department of Transportation Declaratory Order 98-12-27, which contained rulings on five issues of federal law affecting the operation of Love Field, a municipal airport in Dallas, Texas. The Department of Transportation ("DOT") chose to initiate the proceeding that resulted in the Declaratory Order to resolve disputes among various parties in the Dallas-Fort

Worth aviation market occasioned by the passage by Congress of the "Shelby Amendment" in October of 1997.[1] The particular statutory provisions at issue here have their roots in events which began over 30 years ago, largely as the result of the effort of Southwest Airlines to fly out of Love Field; and the issues in this case can be understood only if placed in that historical context. The following discussion summarizes the history of the underlying dispute that has culminated in the case now before this Court.

I. HISTORY OF LOVE FIELD LITIGATION

In 1968, after years of sparring over which local airport should be designated to serve the needs of the Dallas-Fort Worth region, the Cities of Dallas and Fort Worth agreed to construct a *new* Dallas-Fort Worth Regional Airport ("DFW") midway between the two cities. For that purpose the cities adopted a Regional Airport Concurrent Bond Ordinance (the "Concurrent Bond Ordinance"), Section 9.5A of which provided that the Cities:

> . . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective *phase-out at Love Field*, Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services*, and to transfer such activity to the Regional Airport effective upon the beginning of operations at the Regional Airport.

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[1] The Shelby Amendment, Public Law 105-66, § 337 is discussed at p. 8, *infra*.

City of Dallas v. Southwest Airlines Co., 371 F.Supp. 1015, 1020 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974) (emphasis added). In 1970, the principal airlines then serving the Dallas-Fort Worth area signed agreements to serve DFW Airport, and in 1974 moved all their flights from Love Field and other local airports to the newly-opened DFW Airport. 371 F.Supp at 1020-21. This massive facility is located in Grapevine, Texas, some 22 miles from downtown Dallas, nearly four times farther than close-in Love Field.

On June 18, 1971, after three and a half years of hearings, litigation, and appeals occasioned by competing air carriers,[2] Southwest Airlines began service as an intrastate airline certificated by the Texas Aeronautics Commission, serving routes from Dallas Love Field to Houston, and San Antonio, Texas. In October 1971, Southwest advised the DFW Airport Board that it did not intend to serve DFW, and in March 1972, Southwest formally petitioned the DFW Airport Board for an exemption from or waiver of Section 9.5 of the Concurrent Bond Ordinance to allow Southwest to continue to serve Love Field. The response from Dallas, Fort Worth and the DFW Airport Board was a lawsuit, seeking a declaratory judgment declaring their right under federal and state law to exclude Southwest from Love Field. Southwest counterclaimed, seeking a declaration of its right under federal and state law to remain at Love Field. The Texas Aeronautics Commission, the state agency that authorized

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[2] *See, e.g., Texas International Airlines, Inc. v. Civil Aeronautics Board*, 473 F.2d 1150 (D.C. Cir. 1972); *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex.), *cert. denied*, 400 U.S. 943 (1970).

Southwest's certificate to provide intrastate service, intervened in support of Southwest.

In an exhaustive opinion, the district court resoundingly rejected the position of the cities and the DFW Airport Board that they could exclude Southwest from Love Field. Relying on both federal and state law grounds, the court ruled that Southwest's Love Field service could not be barred by Section 9.5 of the Concurrent Bond Ordinance and that "the exclusion of Southwest Airlines from Love Field would not be legally permissible." The Fifth Circuit affirmed this decision and this Court denied certiorari. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 777 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).[3]

As a consequence of the federal court decisions, Southwest operated out of Love Field, as an intrastate carrier, during most of the 1970's. In 1978, however, Congress passed the Airline Deregulation Act, Pub. Law 95-504 (1978), dramatically liberalizing the route entry and pricing freedom of commercial air carriers. Deregulation created the opportunity for Southwest Airlines to become an interstate air carrier. In late 1978, Southwest launched its first interstate service, between Houston and New Orleans. In January 1979, Southwest filed an application with the U.S. Civil Aeronautics Board ("CAB") for authority to fly between Dallas (Love Field) and New

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[3] This defeat did not deter the Cities of Dallas and Fort Worth, the DFW Airport Board, or the DFW air carriers from other efforts to expel Southwest from Love Field. Each attempt, however, was rebuffed by the federal courts. *See, e.g., Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F.Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

Orleans under the Automatic Market Entry ("AME") provisions of the Airline Deregulation Act. Fort Worth, Dallas, the DFW Airport Board, American Airlines, Congressman Jim Wright (then House Majority Leader and representative from Fort Worth), and others acting in concert with them filed objections to Southwest's application with the CAB. However, the CAB awarded Southwest permanent authority in the Dallas (Love Field) – New Orleans market in 1979. Order 79-6-187, CAB Dockets 33777, *et al.* (June 28, 1979).

II. PASSAGE OF THE WRIGHT AMENDMENT

Their failure before the Civil Aeronautics Board prompted the Dallas/Fort Worth parties to turn to Congress, in an effort to change the law and to restrict service at Love Field. Majority Leader Wright offered an amendment to an unrelated aviation bill under consideration by the House, which would have *prohibited*, as a matter of federal law, *all commercial interstate air service* at Love Field. The Senate failed to agree to this amendment, however, and the matter was referred to a conference committee.[4] After lengthy negotiations, a legislative compromise was struck. This legislation, known as the Wright Amendment (Section 29 of the International Air Transportation Competition Act of 1979, Public Law 96-192), was described by the Conference Committee as "a fair and equitable settlement for a dispute that has raged in the

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[4] *See* discussion in the Department of Transportation's *Love Field Amendment Proceeding*, Order 85-12-81 at 3 (December 31, 1985) (DFW Airport Board Pet.App. 11), *aff'd Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988).

Dallas/Fort Worth area for many years." Senate Conference Report No. 96-531, 96th Cong. 1st Session, at 24.

Subsection (a) of the Wright Amendment prohibited (except as provided in subsection (c) of the Amendment) the federal government from authorizing any interstate service at Love Field, except for a small quota of charter flights and an allowance for commuter air carriers operating aircraft with no more than 56 seats. Subsection (b) allowed Southwest to continue its existing interstate (New Orleans) service at Love Field, but prohibited airlines from offering other interstate services at Love Field except as specifically authorized by the Wright Amendment.

Subsection (c) carved out a limited exception to the ban on interstate service from Love Field involving planes with more than 56 seats. It allowed air carriers to provide such service between Love Field and points in the four states contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico). However, even this limited exception was made subject to two additional restrictions, to ensure that airlines could not evade the law's intent to maintain Love Field as a "short-haul" airport. Under the Wright Amendment, subsection (c), an air carrier can offer the interstate service within the designated five state area provided: (1) the air carrier does not offer through service or ticketing with another air carrier; and (2) the air carrier "does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside [the five-state service area]."[5]

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[5] The Department defined "through service and ticketing" in the *Love Field Amendment Proceeding, supra* as "the provision of transportation between an ultimate origin and destination on

III. PASSAGE OF THE SHELBY AMENDMENT

For almost 18 years the Wright Amendment governed the permissible geographic boundaries for air service from Love Field: Texas and the contiguous states of Louisiana, Arkansas, Oklahoma, and New Mexico. The constitutionality of the Wright Amendment was upheld by courts of appeals as a legitimate exercise of the plenary power of Congress to regulate interstate commerce. *Kansas v. United States*, 16 F.3d 436 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991).

As an act of Congress, however, the Wright Amendment was subject to modification by that body. In 1997, Senator Richard Shelby of Alabama, Chairman of the Senate Appropriations Committee, added an amendment to an otherwise unrelated aviation appropriations bill (the "Shelby Amendment"), which expanded the permissible geographic scope of service from Love Field to include three additional states: Kansas, Alabama, and Mississippi. The Shelby Amendment also modified the Wright Amendment to define the term "passenger capacity of 56 passengers or less" to include large aircraft (300,000 pounds or less gross weight), reconfigured to accommodate 56 or fewer passengers. Public Law 105-66, § 337 (1997). The Shelby Amendment became law on October 27, 1997.

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a single ticket for a single sum . . . The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights." The key concept is that it is "sold by the carrier, and perceived by the passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract." DFW Airport Board Pet. App. 14 (Order 85-12-81).

IV. FORT WORTH'S LAWSUIT

Promptly after Congress passed the Shelby Amendment (but before the President signed it), the City of Fort Worth filed suit in the 48th Judicial District Court of Tarrant County, Texas against the City of Dallas and certain air carriers that were viewed as potential users of Love Field, though not against Southwest.[6] The City of Fort Worth sought a declaratory judgment that the City of Dallas was contractually obligated to Fort Worth to prevent any air carrier from taking advantage of the Shelby Amendment.

On October 15, 1998, the state district court granted summary judgment for Fort Worth and its litigation allies, American Airlines and the DFW Airport Board against Dallas, Continental Express, Inc. and Legend Airlines, Inc. In a brief order that did not include a supporting opinion, the court ruled that Dallas was obligated by the 1968 Concurrent Bond Ordinance to bar airlines at Love Field from operating additional services authorized by the Shelby Amendment and that federal law did not override the cities' agreement to restrict Love Field service. *See* FW Pet.App. 178.

V. THE DOT PROCEEDING BELOW

In August 1998, while the Tarrant County litigation was still underway, the DOT instituted the *Love Field Service Interpretation Proceeding*, in order to "issue a ruling on the major federal law issues raised by the dispute" in

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[6] Interference by suit with Southwest's use of or access to Love Field had been prohibited by an earlier federal court injunction against, among others, the City of Fort Worth. *See* note 3, *supra*.

the state court proceeding. DOT Order 98-8-29 at 1, August 25, 1998. The Department's order explained that several of the parties in the Texas litigation had asked the Department to take steps to resolve the dispute; that certain members of Congress had urged the Department to take action to assert the federal interests involved in the dispute; and, that, as the agency primarily responsible for administering the relevant federal statutes, the Department believed it had a responsibility to rule on the federal issues underlying the Texas litigation, much as the Department had done in 1985 in the *Love Field Amendment Proceeding, supra,* n.4. The Department therefore requested comments from interested parties on five issues of federal law. FW Pet.App. 53, 80-81. DOT Orders 98-8-29 and 98-9-5 (September 3, 1998).

Following voluminous comments to the DOT, by the parties who are now before this Court, as well as by other interested parties, the Department ruled on the five issues as follows:

> (1) The City of Dallas' proprietary powers as owner of Love Field do not allow it to bar air carriers from operating services authorized by the Shelby Amendment, and thus Fort Worth may not enforce contractual claims against Dallas that would force it to do otherwise.
>
> (2) Under the federal aviation preemption provision, the Wright and Shelby Amendments preempt any agreement between Dallas and Fort Worth to restrict air service at Love Field that is permitted by those Amendments.
>
> (3) The Shelby Amendment allows an airline to operate long-haul service from Love Field with any aircraft having no more than 56 seats, including regional jets.

(4) The DFW use agreements may not be enforced to block a DFW signatory airline from offering interstate service at Love Field that is permitted by the Wright and Shelby Amendments.

(5) The Wright Amendment permits Continental Airlines and its subsidiary Continental Express to offer through service and ticketing from Love Field to points outside Love Field service area via Houston, so long as their flights from Love Field to Houston use aircraft with 56 seats or less.

See Order 98-12-27 (FW Pet.App. 53, 145-46).

Following petitions for reconsideration by the City of Fort Worth and the DFW Airport Board, the DOT issued an Order on Reconsideration that generally affirmed its prior rulings in Order 98-12-27.[7] Issue Five, whether Continental Airlines' through service and ticketing from Love Field to points outside the Love Field service area via Houston is lawful, which is the subject of this Response, was not substantively discussed in the DOT's Order on Reconsideration.

VI. THE FIFTH CIRCUIT DECISION

Various of the parties to the DOT proceeding petitioned the United States Court of Appeals for the Fifth Circuit challenging some or all of the decisions on the five issues. Southwest strongly supported the Department's rulings on Issue One, regarding the limited scope of Dallas' proprietary rights, and Issue Two, regarding

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[7] The Order on Reconsideration is publicly available at 1999 WL 218767 (D.O.T.). It is also reprinted in the Appendix to the Petition for a Writ of Certiorari filed in this matter by American Airlines, Inc. at 128a.

the preemptive effect of the Wright and Shelby Amendments over state and local government regulation. The Department's rulings on those issues were, in fact, in full accord with Southwest's comments to the Department in the *Love Field Service Interpretation Proceeding*.

However, Southwest believed that the DOT erred in ruling on Issue Five that Continental Express and Continental Airlines may lawfully offer through service and ticketing between Love Field and points beyond the eight-state Love Field service area via Houston, so long as their flights between Love Field and Houston are conducted with aircraft having no more than 56 seats. Accordingly, Southwest filed a petition for review of Order 98-12-27 in order to challenge the Department's ruling on Issue Five.[8] In its decision, the court of appeals denied relief to all petitioners, affirming the DOT's orders on all five points. *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir. 2000) (FW Pet.App. 1).

On the through service issue, the court of appeals obviously acted with reluctance, noting that the statutory interpretations necessary to support of the DOT's position on this issue "strain the meaning of [the statute's] terms." 202 F.3d at 813 (FW Pet. App. 51). Southwest believes that the statutory interpretation made in connection with Issue Five does not simply strain the language of the Wright Amendment, it breaks that statute. By

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[8] Southwest took no position before the DOT or in the Fifth Circuit on Issues Three (56 seat non-stop service) and Four (use agreements). Accordingly, Southwest takes no position here on the DFW Airport Board's request that the Court grant a writ to consider Question No. 1, as stated in the Cross Petition, which concerns DOT Issue Four.

affirming the DOT's negation of the express will of Congress as set out in that statute, the Fifth Circuit has both violated this Court's clear direction in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the obligation of a court to honor the express intent of Congress; and brought itself into conflict with the D.C. Circuit's application of the Wright Amendment in *Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). This Court should act to correct both that violation of its direction and the consequent conflict between the Circuits.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Fifth Circuit's interpretation of the Wright Amendment with respect to single-ticket service violates the teaching of the Court in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* and creates a conflict with a decision of the D.C. Circuit.

Because the Department of Transportation has responsibility for the administration of the Wright Amendment,[9] the rules established by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,

[9] *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994) at 371 (It is well established that the DOT "has regulatory authority to enforce the federal aviation laws."); *Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991) (explaining that the DOT enforces the Love Field (or Wright) Amendment); *Continental Air Lines, Inc., v. Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) (applying *Chevron* analysis to DOT Order interpreting Love Field amendment).

467 U.S. 837 (1984), should have governed the Fifth Circuit's review of the DOT's interpretation of that statute. In *Chevron*, this Court instructed that:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted).

Under *Chevron's* first step, a court must apply the "traditional tools of statutory construction" to determine if the statute in question is ambiguous. 467 U.S. at 843, n.9. Accordingly, the court may consider "both the plain language and meaning of the statute and any pertinent legislative history." *Ghiglieri v. Sun World Nat. Ass'n*, 117 F.3d 309, 313 (5th Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). "It is only when traditional methods of statutory construction fail to reveal a provision's meaning that [courts] conclude that [the statute] is ambiguous." *United Services Auto. Ass'n. v. Perry*, 102 F.3d 144, 147 (5th Cir. 1996). Because the Wright Amendment is clear on the issue presented here, the limitations on single-ticketing from Love Field, the Fifth Circuit's review should have been governed by Step I of *Chevron*. Accordingly, the

court of appeals should have applied the unambiguous words of the statute. It did not follow that rule, and in so doing it both violated the intent of Congress and created conflict with another Circuit – two results which justify the attention of this Court.

A. The DOT's Ruling on Issue Five, Affirmed by the Fifth Circuit, Violates the Plain Meaning of the Wright Amendment.

1. The Language of the Statute

With respect to the precise issue at hand, the Wright Amendment is unambiguous. An air carrier may not advertise and sell through service from Love Field to a destination outside the eight-state Love Field service area, at least when using large aircraft (having more than 56 seats) to fly beyond those eight states.

While the Department framed this issue – Number Five on its list – in broad and generic terms when it instituted the *Love Field Service Interpretation Proceeding* (FW Pet.App. 81), it expressed its final ruling on Issue Five entirely in the context of the service actually being provided to Love Field passengers by Continental Airlines and its subsidiary Continental Express (FW Pet.App. 141-46), and it was this specific ruling which the Fifth Circuit affirmed. 202 F.3d at 812, n.23 (FW Pet. App. 48). Accordingly, to understand the DOT's ruling and the Fifth Circuit's affirmance, it is crucial to understand precisely what service Continental and Continental Express are holding out to Love Field passengers.

Continental Express began serving Love Field in June 1998, flying between Love Field and Houston's George Bush Intercontinental Airport with 50-seat "regional jets,"

new generation aircraft which, though smaller than conventional commercial jet aircraft, fly at speeds and altitudes comparable to many large jets. Even before Continental Express commenced its Love Field-Houston regional jet service, it began advertising and selling service it described as "Love Field to the World." 202 F.3d at 812. The advertisements proclaimed that "More than 190 Destinations in 38 Countries" are now "Available at Love Field." That service continues today.

Under this scheme, Continental Express transports Love Field passengers to Houston on its 50-seat aircraft, then transfers them to flights operated by Continental Airlines on large aircraft (*i.e.*, conventional jets with more than 56 seats) from Houston to numerous points around the nation and the world. Love Field passengers transported by Continental on this service receive a single ticket with a single sum fare, and are routed to their final destination without having to reclaim and recheck their luggage. In this manner, Continental Airlines is providing through service and ticketing of passengers between Love Field and points beyond the Love Field service area. Declaratory Order 98-12-27 (FW Pet.App. 141-42); *American Airlines, Inc. v. Department of Transportation*, 202 F.3d at 812 (FW Pet App. 47-48).

Viewed against the plain language of the Wright Amendment, Continental's "Love Field to the World" service unquestionably violates the statute. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed." *Caminetti v. United States*, 242 U.S. 470, 495 (1917). Subsection (c) of the Wright Amendment, as amended by the Shelby Amendment, authorizes air carriers to provide service between Love Field and points in

the eight-state Love Field service area, subject to two restrictions. The second of these restrictions is that

> (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State.

Wright Amendment subsection (c). Because Continental is offering for sale transportation from Love Field to, and its flight and aircraft serve, points outside the eight-state region, Continental is doing precisely what the statute prohibits.

The DOT attempted to escape the plain language of the beyond-area restriction in subsection (c)(2) by resorting to language in subsection (a) of the Wright Amendment. That subsection *prohibits* the federal government from authorizing:

> transportation of individuals, by air, as a common carrier . . . *between Love Field, Texas and one or more points outside the State of Texas,* except . . . *(2)* air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

Wright Amendment subsection (a) (emphasis added). The Department claims that, because Continental Express flies between Love Field and Houston with aircraft having less than 56 seats, the "commuter exception" of subsection (a) (2) exempts the *entire* through service and ticketing offered by Continental Express and Continental Airlines between Love Field and "the World" from the prohibition in subsection (c) (2) against providing service to points outside the Love Field service area. FW Pet.App. 142-43 (Order 98-12-27).

The DOT's analysis, which the court of appeals characterized as "strained," but which it nevertheless

affirmed,[10] suffers from two critical defects, in light of the plain language of the statute. First, Continental Express is not providing "transportation of individuals, by air, between Love Field, Texas and one or more points *outside the State of Texas* . . . ," as subsection (a) (2) requires. Continental Express is instead transporting Love Field passengers only to Houston, a point *within* Texas. Thus, whatever the reach of the "commuter exception" in subsection (a) may be, Continental Express does not qualify for it, as it is providing only intrastate, not interstate service at Love Field. Subsection (a) is simply inapplicable to Continental Express' Dallas-Houston service and therefore cannot shield its "Love Field to the World" flights from the clear prohibition against beyond-area service in subsection (c) (2).[11]

Moreover, even if Continental Express were operating small-aircraft flights to a point outside Texas, the commuter exception of subsection (a) would not immunize Continental's through service and ticketing to points beyond the Love Field service area from the prohibition in subsection (c). Subsection (a) and subsection (c) must be read *together*, not as independent statutes with no relationship to one another. As this Court has instructed, "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often

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[10] 202 F.3d at 813 (FW Pet. App. 51).

[11] In its decision, the Fifth Circuit stated that "[t]he substance of DOT's ruling . . . is geared towards the specific service offered by Continental Express and therefore considered solely whether the Love Field amendments permit an airline to offer through service through a point *within Texas*. We limit the scope of our review to the narrower question actually resolved by DOT." 202 F.3d at 812, n.23 (FW Pet. App. 48).

clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

The first sentence of subsection (a) reads: "*[e]xcept as provided in subsection* (c)." The plain meaning of this language is that the prohibition on interstate flights (and with it, the exception for commuter aircraft) *does not apply* to the circumstances set forth in subsection (c). The language in subsection (c) reinforces this interpretation:

> *[s]ubsections (a) and (b) shall not apply* with respect to, and it is found consistent with the public convenience and necessity to authorize transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if . . . (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State.

Subsection (c) (emphasis added). The statute is clear that interstate service is permitted from Love Field to points within the five (now eight) state service area, but not beyond. This prohibition in subsection (c) applies to a flight and aircraft of an air carrier – not a flight that uses only large aircraft *all the way from Love Field to its final destination*.

The Department's reading of the statute creates ambiguity where there is none. *Cf. City of Dallas v. FCC*, 165 F.3d 341, 353 (5th Cir. 1999). ("Because we believe the Commission has ignored plain text and has attempted to manufacture an ambiguity in order to obtain an increased

level of judicial deference, we invalidate the rule . . . "). By treating subsection (a) as an independent statutory provision that is unaffected by the prohibition in subsection (c) against beyond-area service, the Department fails to examine "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The Department's reading of subsection (c) – applying it only to flights using large aircraft[12] – does not save the Department's ultimate conclusion on the through ticketing issue. For the Department simply cannot escape the fact that *Continental is using large aircraft to transport Love Field passengers beyond the eight-state service area by means of through service and ticketing*. This service is contrary to the plain language of subsection (c) (2) of the Wright Amendment barring airlines serving Love Field from offering "transportation to or from . . . any point which is outside" the prescribed Love Field service area.

Even the DOT concedes that subsection (c) applies (at least) to operations with large aircraft. Thus, Continental's through service (on large aircraft) to transport Love Field passengers outside the service area is prohibited. The fact that it used small aircraft on an earlier leg of the journey within the service area is irrelevant. Both portions of the flight would be independently lawful; however, when held out as through service between Love Field and points outside the service area, on a single ticket and with no requirement to reclaim baggage, the service plainly violates subsection (c).

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[12] For example, the DOT describes subsection (c) as the subsection governing flights with large aircraft." FW Pet. App. 142 (Order 98-12-27).

This concern by Congress for the careful control of single-ticketing in the context of its detailed regulation of Love Field flights should not be surprising; for it is a significant matter. Indeed, the DOT never acknowledges the practical consequences of its ruling in the marketplace. The Department has, in effect, created an exception that swallows the rule against holding out air service between Love Field and points beyond the eight-state service area. DOT's ruling confers upon Continental Airlines the very substantial competitive advantage of advertising and selling flights from Love Field to, for example, Baltimore, Cleveland, London, and a multitude of other destinations around the nation and the world which Southwest cannot legally serve from Love Field because it uses only large aircraft.

The DOT's ruling has produced two sets of operating rules for two air carriers using the same type of aircraft to transport the same passengers between the same points. The Department never explains how two such arbitrarily different and discriminatory operating regimes can fairly be attributed to the wishes of Congress. While the Department glibly asserts that any such discrimination "stems from Southwest's own decisions" to use large aircraft, Order 98-12-27 (FW Pet. App. 145), it simply overlooks the fact that Continental, in competition with Southwest, is itself using large aircraft to transport Love Field passengers to points outside the eight Love Field states. This failure to recognize these practical realities, which were obviously of real importance to Congress, only confirms the failure of the DOT and the Fifth Circuit to carry out the express will of Congress on the single-ticketing issue.

2. The Legislative History

Chevron directs the courts to use "traditional tools of statutory construction," 467 U.S. at 843, n.9, in reviewing agency interpretations. The first method of construction, of course, is to read the statute. Where, as here, the language is clear, nothing further is necessary. However, if resort is made to the second tool of statutory construction, legislative history, that also leads to the conclusion that the DOT and the court of appeals have not simply strained the congressional scheme, they have violated it.

The legislative history in the present case is clear and compelling: Congress intended to prohibit any air carrier from transporting Love Field passengers to points outside the Love Field service area on large aircraft. There is nothing in the legislative history remotely suggesting that Congress intended to exempt from that prohibition an air carrier using small aircraft to fly to a point in Texas, then connecting with large aircraft to transport passengers outside of Texas and the other seven states in the Love Field service area, by means of through service and ticketing.

As discussed earlier, the original version of the legislation that became the Wright Amendment was introduced by Majority Leader Jim Wright of Fort Worth, in response to the CAB's *Automatic Market Entry* decision authorizing Southwest Airlines "to inaugurate a new series of interstate flights at the abandoned Love Field." 125 Cong. Rec. H10577 (Nov. 13, 1979) (statement of Rep. Wright). Rep. Wright made no secret of his objective. Noting that "the cities of Fort Worth and Dallas jointly had committed $600 million of their taxpayers' money to the building of a new, modern, and safe facility midway

between those two cities," he sought to eliminate competition with the new DFW Airport by barring *all* interstate air service at Love Field. Id. While the conference compromise legislation was less restrictive, in allowing limited interstate service, its objective remained the same – to limit Love Field's competitive impact on the newly constructed DFW airport. *See Kansas v. United States*, 16 F.3d 436, 438 (D.C. Cir. 1994) ("Congress passed the Wright Amendment to limit the competitive impact of Love Field.").

The legislation achieved this goal by severely limiting the reach of interstate flights that could be operated at Love Field. By restricting Love Field's interstate flights to short-haul service to the four contiguous states, Congress ensured that Love Field services would not present a viable competitive threat to the new DFW Airport, where interstate service would be completely unrestricted.

The DOT itself reached the same conclusion in 1985, the last time it had occasion to review the restrictions on Love Field air service:

> The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states.
>
> * * *
>
> Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area.

DFW Pet. App. 11,14 (Order 85-12-81). The D.C. Circuit, in reviewing the DOT's 1985 Order, agreed. *See Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1447 (D.C. Cir. 1988) ("Congress' intent in crafting the Love Field

Amendment was solely to limit that airport to 'short-haul' service.").

Continental Airlines' through service and ticketing of Love Field passengers to "More than 190 Destinations in 38 Countries" is hardly "short-haul." Yet, the Department's order does not squarely address the glaring conflict between its ruling on this point and the intent of Congress, repeatedly recognized by the courts (and by the DOT itself in 1985), to limit Love Field's interstate flights to a strictly confined service area. The Fifth Circuit, in its effort to defer to the "DOT's expertise" and avoid substituting its own apparently contrary opinion on this issue, 202 F.3d at 813 (FW Pet. App. 52), overlooked the first rule of *Chevron* – that both agencies and courts must defer to the will of Congress in interpreting and applying legislation. 467 U.S. at 842-43. That violation of the direction of this Court and the consequent failure to apply the law as written by Congress to the operation of aviation in North Texas is the reason to grant review here.

B. The Conflict with the D.C. Circuit

The DOT has failed entirely to reconcile its present view of the statute with the opposite position, which it took in the *Love Field Amendment Proceeding, supra,* when it addressed the application of the Wright Amendment to air carriers offering both intrastate and interstate service on the same flight. Then, the Department concluded as follows:

> The CAB . . . decided that *carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and*

> *points outside the five-state area*. The Department believes the CAB was substantially correct.
>
> * * *
>
> . . . the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

DFW Airport Board Pet.App. 19-20 (Order 85-12-81). This position was affirmed by the United States Court of Appeals for the District of Columbia Circuit in its decision in *Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). The D.C. Circuit held that the " . . . DOT's interpretation is consistent with the purpose of the Amendment to limit Love Field to short haul services." 843 F.2d at 1454-55. As the DFW Airport Board has noted at length in its Cross-Petition, at 20-28, the Fifth Circuit's affirmance of the through ticketing provision of the DOT's 1998 Order creates a conflict with the D.C. Circuit's affirmance of the contradictory 1985 Order.

The DOT and the court of appeals both brush off this contradiction in footnotes, arguing that the earlier Order referred only to Love Field flights operated with large aircraft subject to the restrictions of subsection (c). FW Pet.App. 143, n.30 (Order 98-12-27); *American Airlines, Inc. v. DOT*, 202 F.3d at 813, n.24 (FW Pet. App. 50-51). These statements overlook the fact that Continental's connecting flights at Houston transporting Love Field passengers outside the service area are also *"operated with large aircraft subject to the restrictions of subsection* (c)," via through service and ticketing. The DOT has failed to provide a principled distinction between its present position on this point and its contrary 1985 position. Nothing

in the Wright Amendment's legislative history indicates that an airline can evade the beyond-area service restriction simply by using a small aircraft on the first leg of the journey. To the contrary, the Conference Report states:

> *The Act*, however, imposes certain conditions on *any airline* certificated to operate interstate Love Field service. . . . Such Love Field *carriers* may not hold out, offer or advertise Love Field service to or from points beyond the four contiguous States in any respect . . .
>
> Thus, *a carrier providing service from Love Field to a point in one of these States* is not forbidden from providing service from that point to other points in other States beyond, but it could not do so on a continuation of the same flight to or from Love Field, or on the same aircraft coming from or going to Love Field, and *it could not advertise or promote its service to points in States beyond.*

H.R. Conf Rep. No. 96-716, at 25-26 (1979) (emphasis added).

Congress' intent could not have been more clear. The conditions specified in subsection (c) are requirements for all service described in "the Act"; those conditions apply to "any airline" providing Love Field service; and, "a carrier providing service from Love Field to a point in one of these States" [in the service area] "could not advertise or promote its service to points in States beyond."

DOT's only response to this overwhelming evidence of Congress' intent to limit Love Field to short-haul service is the assertion that "the Shelby Amendment demonstrates that Congress is less interested in limiting Love Field to short-haul service, when the Love Field flight is operated with aircraft with a passenger capacity of 56 passengers or less." FW Pet.App. 144-45 (Order 98-12-27).

Yet, there is nothing in the language of the Shelby Amendment, nor in its legislative history, to support the Department's sweeping conclusion. Subsection (a) of the Shelby Amendment clarifies the definition of commuter aircraft to include "aircraft . . . reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56." Subsection (b) of the Shelby Amendment simply amends subsection (c) of the Wright Amendment to add Kansas, Alabama and Mississippi to the five states within which interstate service is permitted at Love Field. Aside from these specific, narrow provisions, there is nothing at all in the language of the Shelby Amendment indicating that "Congress is less interested in limiting Love Field to short-haul service . . . "

The Shelby Amendment's sparse legislative history is even more unavailing to DOT. The only mention of the Amendment in the Conference Committee Report states: "The conferees have included the provision recommended by the Senate *clarifying the meaning* of Section 29(a)(2) of the International Air Transportation Competition Act of 1979 regarding air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." H.R. Conf. Rep. No. 105-313, at 45 (1997) (emphasis added).

At most, the Shelby Amendment can be read to allow aircraft reconfigured to hold 56 seats to be used under the "commuter exception," subsection (a) (2) of the Wright Amendment; and to expand the Love Field service area under subsection (c) from five to eight states. This is a far cry from DOT's position, that the Shelby Amendment expanded the Love Field service area to include "190

Destinations in 38 Countries" so long as an aircraft of 56 seats or less is used on the first leg of the journey.

In short, the Department's interpretation of the Wright Amendment, as affirmed by the Fifth Circuit, conflicts with the plain language of the statute and the intent of Congress to limit Love Field to short-haul air service, and to prohibit through service and ticketing of Love Field passengers to points outside the Love Field service area on large jets.

CONCLUSION

Congress has chosen to regulate precisely the distribution of airline business in North Texas between DFW Airport and Love Field. For over a decade following the 1985 DOT Order and the D.C. Circuit decision affirming it, the through ticketing issue had been understood. Now, entirely unrelated to the Shelby Amendment, the DOT and the Fifth Circuit have changed the rules on that issue, creating conflict with both the will of Congress and the prior decisions. Those conflicts are the proper business of this Court to resolve.

For the foregoing reasons, the writ of certiorari should be granted on Cross-Petitioner's Question No. 2 concerning the Wright Amendment's prohibition against through service and ticketing of Love Field passengers to points beyond the Love Field service area.

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STATUTORY PROVISIONS

The Wright Amendment. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29 (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, except (1) charter air transportation not to exceed ten flights per months, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
>
> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.
>
> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize,

> transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The Shelby Amendment. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94

Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

Supreme Court, U.S.
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Nos. 99-1462, 99-1739 and 99-1745

In the Supreme Court of the United States

CITY OF FORT WORTH, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

AMERICAN AIRLINES, INC., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the City of Dallas is precluded by the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), or by two subsequent Acts of Congress, the Wright and Shelby Amendments, from restricting routes and services operated by airlines from its Love Field airport.

2. Whether agreements between the Dallas-Fort Worth International Airport Board and various airlines, which provide that the airlines will not use competing airports such as Love Field without the Board's permission, are preempted by federal law.

3. Whether the Department of Transportation was bound by a state court judgment, recently reversed on appeal, in a suit brought by the City of Fort Worth against the City of Dallas, to which the United States was not a party and in which the state court interpreted federal statutes governing Love Field service.

4. Whether the Department of Transportation correctly construed the Wright and Shelby Amendments as permitting "through service" from Love Field when the initial portion of the trip is to another location within Texas and is made on an aircraft with a capacity of no more than 56 passengers.

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In the Supreme Court of the United States

No. 99-1462

CITY OF FORT WORTH, PETITIONER

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DEPARTMENT OF TRANSPORTATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 202 F.3d 788. The orders of the Department of Transportation (Pet. App. 53-177) are unreported.[1]

[1] "Pet. App." refers to the appendix to Fort Worth's petition for a writ of certiorari (No. 99-1462). "FW Pet.," "AA Pet.," and "DFW Pet."

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-52) was entered on February 1, 2000. The petition for a writ of certiorari in No. 99-1462 was filed on March 3, 2000. The petitions for a writ of certiorari in No. 99-1739 and No. 99-1745 were filed on May 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the domestic airline industry. The Act, after a phase-in period, allowed each airline to operate from any commercial airport and to serve any domestic route without prior regulatory approval. To ensure that state and local governments would not replace federal regulation with regulation of their own, Congress included a preemption provision, which barred state and local governments from enforcing any law "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b); see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992). That provision, however, "does not limit" a state or local government that "owns or operates an airport" from "carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3).[2]

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refer to the petitions for a writ of certiorari filed by Fort Worth, American Airlines, and the Dallas-Fort Worth International Airport Board, respectively.

[2] Section 41713(b) provides, in pertinent part:

> Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Two subsequent Acts of Congress specifically govern airline service at Love Field airport in Dallas. The Wright Amendment, enacted in 1980, restricts interstate service at Love Field, but expressly authorizes certain service. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 48-49.[3] The Shelby Amendment,

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* * * * *

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

[3] The Wright Amendment (§ 29, 94 Stat. 48) provides, in pertinent part:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

* * * * *

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from,

enacted in 1997, expanded the scope of interstate service authorized at Love Field. Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1447.[4]

The Department of Transportation is responsible for administering the preemption provisions of 49 U.S.C. 41713. See 49 U.S.C. 40113(a) (Secretary of Transportation may take whatever action he "considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders"); 49 U.S.C. 46101(a)(2); see also *American Airlines* v. *Wolens*, 513 U.S. 219, 229 n.6, 234 (1995) (Department of Transportation is the "superintending agency" and "experienced administrator" of the preemption provision). The Depart-

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and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

[4] The Shelby Amendment (§ 337, 111 Stat. 1447) provides, in pertinent part:

(a) IN GENERAL.—For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXEMPTION.—The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 *et seq.*) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

* * * * *

ment is also responsible for administering and enforcing the Wright and Shelby Amendments. *Kansas* v. *United States*, 16 F.3d 436, 438 (D.C. Cir.), cert. denied, 513 U.S. 945 (1994); *Cramer* v. *Skinner*, 931 F.2d 1020, 1024 (5th Cir.), cert. denied, 502 U.S. 907 (1991); *Continental Air Lines* v. *Department of Transp.*, 843 F.2d 1444, 1448 (D.C. Cir. 1988).

In this case, the Department of Transportation, after soliciting and reviewing comments, issued a ruling interpreting those statutes. The Department concluded that Dallas may not restrict the routes and services that airlines provide from Love Field, either directly or by contract between the Dallas-Fort Worth International Airport Board (the DFW Airport Board) and an individual airline. Pet. App. 93-127, 133-141.[5]

1. For many years, the twin cities of Dallas and Fort Worth each operated their own airports, which competed to be the area's principal airport. Love Field was the local airport for Dallas. The cities resolved the dispute by agreeing to build Dallas-Fort Worth International Airport (DFW Airport). See *Cramer*, 931 F.2d at 1023. The cities' agreement, set forth in their 1968 Regional Airport Concurrent Bond Ordinance (1968 Bond Ordinance), required the cities to phase out virtually all interstate scheduled service at their local airports to the extent "legally permissible." Pet. App. 2-3, 58-61.

After DFW Airport opened, Dallas continued to operate Love Field. The interstate airlines moved to DFW Airport, but Southwest Airlines, then a new airline that provided service only within Texas, refused to move. After extensive litigation, Southwest Airlines won a judgment entitling it to

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[5] The DFW Airport Board is a local governmental body created and authorized under state law to be the owner and operator of Dallas-Fort Worth International Airport. Dallas appoints seven of the members of the 11-member Board. Pet. App. 58.

continue using Love Field for flights within Texas. See *Cramer*, 731 F.2d at 1023; Pet. App. 3.

Although Southwest Airlines initially operated only intrastate routes, after the enactment of the Airline Deregulation Act, the Civil Aeronautics Board ruled, over the objection of Dallas and Fort Worth, that Southwest Airlines could operate a Love Field-New Orleans route. *Cramer*, 731 F.2d at 1023. In response to that decision, Congress enacted the Wright Amendment, which was designed as a compromise between the two cities and Southwest Airlines. See H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979); Pet. App. 3-4, 64, 123.

The Wright Amendment restricts interstate scheduled passenger service from Love Field. Subsection (a) permits interstate flights from Love Field by aircraft having a capacity of no more than 56 passengers. Subsection (c) permits flights from Love Field to the four States bordering Texas—Louisiana, Arkansas, Oklahoma, and New Mexico—on aircraft of any size, but prohibits interline or through service. Pet. App. 3-5 n.1.[6] Dallas and Fort Worth did not attempt to block Southwest Airlines from adding interstate routes in accordance with the Wright Amendment. Nor did the cities amend the 1968 Bond Ordinance to reflect the Wright Amendment. *Id.* at 64-67.

In 1997, Congress enacted the Shelby Amendment, which expands the interstate service authorized at Love Field. The Shelby Amendment clarifies subsection (a) of the Wright Amendment as including large aircraft of up to 300,000 pounds gross aircraft weight if they are configured

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[6] Interline service is connecting service involving a change from one airline to another that is provided under agreements whereby each carrier agrees to accept tickets written for travel on it by the other carrier; the carriers provide for transfer of baggage between the flights. Through service is service provided between the origin and destination on a single ticket.

or reconfigured to have no more than 56 seats. The Shelby Amendment expands subsection (c) to add three more States —Mississippi, Alabama, and Kansas—to those to which service from Love Field is permissible on an aircraft of any size. Pet. App. 5-7 & n.2, 71-72.

2. After the enactment of the Shelby Amendment, Fort Worth sued Dallas in Texas state court, contending that Dallas was constrained by the 1968 Bond Ordinance from allowing the expanded service at Love Field authorized by the Shelby Amendment. *City of Fort Worth* v. *City of Dallas*, No. 48-171109-97 (Tarrant County Tex. Dist. Ct., filed Oct. 10, 1997). Fort Worth was supported by the DFW Airport Board and American Airlines, which has a major hub at DFW Airport. The Department of Transportation was not a party to that action. Pet. App. 148-149, 158-159.

In December 1998, the state court issued a judgment holding that Dallas was obligated by the 1968 Bond Ordinance to prohibit airlines from using Love Field to serve points outside Texas and the four States identified in the Wright Amendment. The court further held that federal law did not bar Dallas from regulating flights in that manner. Pet. App. 178-181.

Dallas, together with various airlines that planned to use Love Field, appealed. The state court of appeals stayed proceedings pending the Fifth Circuit's decision in this case. Pet. App. 7. After the Fifth Circuit issued its decision, the state court of appeals issued its own decision, which reversed the state trial court. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).

Meanwhile, Dallas sued Forth Worth and the Department of Transportation in federal court, seeking a declaratory judgment that Dallas may not bar airlines from operating interstate service at Love Field. *City of Dallas* v. *Department of Transp.*, No. 3-97CV-2734-T (N.D. Tex., filed Nov. 6,

1997). That action was stayed pending the resolution of this case. Pet. App. 7, 75-76.

3. While the state and federal court actions were pending, the Department of Transportation commenced a proceeding to interpret the federal statutes governing Love Field. Order No. 98-8-29 (Aug. 25, 1998). One week after the state trial court issued its judgment in *City of Fort Worth*, the Department issued its final orders on the statutory interpretation issues and various jurisdictional and procedural issues. Order Nos. 98-12-27 and 98-12-28 (Dec. 22, 1998) (Pet. App. 53-177).[7]

a. As a threshold matter, the Department determined that it has the authority to issue an order interpreting the relevant federal statutes, which it is responsible for administering and enforcing. Pet. App. 154-158 (citing, *inter alia*, *Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 366-367 (1994), and *Wolens*, 513 U.S. at 229 n.6, 234). The Department further noted that the dispute in this case "raises substantial federal issues that this Department should address." *Id.* at 155.

The Department of Transportation concluded that the pending state and federal court proceedings did not preclude it from issuing its interpretation of the federal statutes. The Department explained that, "[g]iven its responsibilities for administering those statutes, the Department should assist the parties by issuing its interpretation." The Department also observed that it was not a party to the state court action, and thus would not be bound by the ensuing state court judgment. Pet. App. 158-159.

b. On the merits, the Department of Transportation concluded that Dallas cannot impose the restrictions on interstate service from Love Field sought by Fort Worth (*e.g.*, a

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[7] The Department of Transportation subsequently reaffirmed the orders on reconsideration. Order Nos. 99-4-13 and 99-4-14 (Apr. 13, 1999).

prohibition on flights from Love Field to States other than the four identified in the Wright Amendment). The Department explained that those restrictions "are equivalent to route regulation." Pet. App. 103. As such, the restrictions are preempted by 49 U.S.C. 41713(b), which prevents state and local governments from enforcing laws "related to a price, route, or service of an air carrier," unless saved by its exception for actions of an owner or operator of an airport to "carry[] out its proprietary powers and rights."

The Department of Transportation noted that the courts have held that States and cities, as airport proprietors, may restrict airline service when "necessary to carry out a legitimate airport goal," such as to alleviate ground congestion, noise, or other environmental problems. Pet. App. 100. But the Department added that "[n]o court has held or suggested that one airport may adopt a perimeter rule [*i.e.*, a rule restricting the distance of flights to and from that airport] to protect a different airport from competition." *Ibid.*

Here, the Department of Transportation determined that the record did not establish that any "legitimate airport goal" would be advanced by the service restrictions sought by Fort Worth. The Department observed that the parties had not presented any evidence showing, for example, that the additional Love Field service authorized by the Shelby Amendment "would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport." Pet. App. 111. Indeed, the Department observed, the Wright and Shelby Amendments continue to impose substantial restrictions on long-haul Love Field services by barring the use of aircraft with more than 56 seats on flights outside Texas and a seven-state area. *Id.* at 112. The Department noted that the flights operated from Love Field, even after the Shelby Amendment, "will be a

small fraction" of the flights operated from DFW Airport. *Ibid.*[8]

In addition, the Department of Transportation concluded that, even aside from the express preemption provision of 49 U.S.C. 41713(b), the Wright and Shelby Amendments impliedly preempt the cities' regulation of service at Love Field. Pet. App. 120-127. The Department reasoned that "Congress has occupied the field" with respect to interstate service at Love Field and that "allowing the cities to restrict service would frustrate Congress' policies." *Id.* at 121.

c. The Department of Transportation concluded that the "use agreements" that the DFW Airport Board entered into with individual airlines are preempted by 49 U.S.C. 41713(b), to the extent that the agreements prevent the airlines from operating interstate flights at Love Field (or other airports in the Dallas-Fort Worth area) without the DFW Airport Board's consent. Pet. App. 133-141.[9] The Department explained that the DFW Airport Board cannot regulate airline routes by contract any more than Dallas and Fort Worth can regulate routes by ordinance. *Id.* at 135. The Department observed that the consent provisions in the use agreements "frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of

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[8] The Department of Transportation also found that Dallas was not a "proprietor" of DFW Airport, and therefore could not justify route restrictions at Love Field on the basis of its needs as the owner or operator of DFW Airport. The Department explained that, although Dallas chooses seven of the 11 members of the DFW Airport Board, Dallas does not control that Board, as reflected in the conflicting positions of Dallas and the Board in this proceeding and in the state court proceeding. The Department also noted that eight members of the DFW Airport Board must approve any decision granting an airline a waiver to use an airport other than DFW Airport for interstate service. Pet. App. 118-120.

[9] Although airlines may use DFW Airport without signing a use agreement, airlines signing a use agreement pay lower fees for the use of that facility. Pet. App. 139.

additional competition and additional service options." *Id.* at 139.

d. The Department of Transportation concluded that airlines may offer through service and ticketing from Love Field to points outside the seven-state service area established by the Wright and Shelby Amendments, if the through service involves (i) an initial flight on an aircraft with a capacity of 56 passengers or fewer from Love Field to another airport in Texas followed by (ii) a flight from that Texas airport to an ultimate destination outside the seven-state service area. Pet. App. 141-145. The Department explained that subsection (a) of the Wright Amendment contains no restriction on through service by aircraft with 56 seats or fewer; only larger aircraft are prevented, by operation of subsection (c), from offering through service and ticketing. The Department also noted that the Wright Amendment imposes no restrictions on intrastate service (*e.g.*, the initial leg of the contemplated travel). *Id.* at 142-143.

The Department of Transportation reasoned that a contrary approach would create a distinction that could not have been intended by Congress. The Department noted that the Wright and Shelby Amendments do not prohibit through service, the initial leg of which is a flight, on an aircraft with a capacity of 56 passengers or fewer, that begins at Love Field and ends in another State. The Department concluded that Congress did not intend a different result where the first leg of the through service was a flight that ended in Texas rather than another State. Pet. App. 145.

4. The court of appeals affirmed the Department of Transportation's orders. Pet. App. 1-52.

a. The court of appeals held that 28 U.S.C. 1738, the "full faith and credit" statute,[10] did not require the Department of Transportation to give preclusive effect to the judgment of the state trial court in *City of Fort Worth*. The court reasoned that Section 1738, by its terms, applies only to "court[s]," not to federal agencies. Pet. App. 17-19.

The court of appeals also held that the Department of Transportation was not required to give preclusive effect to the state trial court judgment as a matter of federal common law. Pet. App. 19-23. In resolving that question, the court weighed "the policies favoring full faith and credit, including repose and federalism concerns," against "the federal interests present here." *Id.* at 19-20. First, the court reasoned that the interests in repose were not strongly implicated, because the Department's proceedings were already well underway when the state court issued its judgment. *Id.* at 21. Second, the court reasoned that the national interests in this case are particularly strong, both because the case involves airline operations, a subject principally regulated by the federal government, and because Congress has twice specifically addressed aviation regulation with respect to Love Field. *Ibid.* Third, the court reasoned that requiring the Department to give preclusive effect to the state court judgment would produce "inconsistent results," because some of the parties before the Department were not parties to the state court proceedings. *Id.* at 22.

b. The court of appeals held that the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), bars Dallas from restricting interstate service at

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[10] Section 1738 provides, in relevant part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Love Field, as Fort Worth contended was required under the 1968 Bond Ordinance. Pet. App. 32-39.[11] The court noted that the parties did not seriously dispute that the restrictions "relat[e] to * * * routes" within the scope of Section 41713(b). *Id.* at 33. The parties disputed only whether the restrictions are within the "proprietary powers" exception to Section 41713(b) for actions of an airport owner carrying out its "proprietary powers and rights." *Ibid.* The court agreed with the Department of Transportation that the exception is inapplicable here. *Id.* at 37-39.

The court of appeals, consistent with other courts that have addressed similar issues, recognized that airport proprietors play an "extremely limited role in the regulation of aviation." Pet. App. 33-34 (internal quotation marks omitted) The court noted that airport proprietors have thus been permitted to adopt perimeter rules and similar route restrictions only to "alleviate an existing problem at the airport or in the surrounding neighborhood," such as airport congestion, noise, or other environmental concerns. *Id.* at 35. The court found that petitioners had failed to justify the restrictions on Love Field service as serving any comparable local objective. *Id.* at 37-38. The court concluded that the reallocation of flights between airports, "in and of itself," is not a sufficient objective to satisfy the proprietary powers exception. *Id.* at 38.[12]

c. The court of appeals also held that the use agreements between the DFW Airport Board and individual airlines are

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[11] The court of appeals found it unnecessary to decide whether the Department's preemption ruling is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court determined that the Department's ruling is correct even under a de novo standard of review. Pet. App. 31-32.

[12] The court of appeals declined to address the alternative grounds for preemption found by the Department of Transportation. Pet. App. 38-39 nn.16, 17.

preempted, to the extent that those agreements prevent an airline from providing interstate service at airports such as Love Field without the Board's consent. Pet. App. 43-47.[13] The court noted that government contracts are subject to preemption if they are an attempt by a state or local government to regulate. *Id.* at 44 (citing, *inter alia*, *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 226 (1993)). The count found that the use agreements, which were designed to implement the 1968 Bond Ordinance and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance," are an attempt to regulate airline service. *Id.* at 45. In view of the "overlap" between the use agreements and the 1968 Bond Ordinance, which the court had already held to be preempted, the court concluded that the use agreements are likewise "an impermissible attempt to regulate in an area where the federal government has preempted state regulation." *Ibid.*

d. Finally, the court of appeals affirmed the Department of Transportation's determination that an airline may, consistent with the Wright and Shelby Amendments, offer through service from Love Field to points outside the seven-state service area if the airline uses a Texas city as a connecting point and an aircraft with 56 seats or fewer to fly to the Texas connecting point. Pet. App. 47-52. The court held that the language of the Wright and Shelby Amendments is not dispositive, but that the Department's construction is permissible under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 50. The court explained that the Department could reasonably

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[13] Again, the court of appeals did not decide whether the Department of Transportation's ruling on this issue is entitled to deference under *Chevron*, because the court concluded that the ruling is correct under a de novo standard of review.

conclude that, because the Wright Amendment imposed an express prohibition on through service on large aircraft operating under subsection (c) but not on small aircraft (*i.e.*, those with a capacity of no more than 56 passengers) operating under subsection (a), Congress intended to permit small aircraft to operate free of such a prohibition. *Ibid.* The court also observed that the Department's construction of the Wright and Shelby Amendments as permitting through service where the initial flight is on an aircraft with no more than 56 seats is "not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some long haul service." *Id.* at 51.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court, any other court of appeals, or any state supreme court. This Court's review is therefore not warranted.

1. Petitioners Fort Worth (Pet. 13-19) and American Airlines (Pet. 11-27) challenge the court of appeals' ruling that 49 U.S.C. 41713(b), the express preemption provision of the Airline Deregulation Act, prevents the enforcement of the 1968 Bond Ordinance whereby Fort Worth and Dallas undertook to phase out interstate flights at their municipal airports. Section 41713(b) bars a city from enacting or enforcing any law "related to a price, route, or service of an air carrier," unless the city is acting, in its capacity as the owner or operator of an airport, to "carry[] out its proprietary powers and rights." 49 U.S.C. 41713(b)(1) and (3). Petitioners do not dispute that the 1968 Bond Ordinance is "a law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). But petitioners contend that the 1968 Bond Ordinance comes within the statutory exception as an exercise of the cities' "proprietary powers and rights."

a. The court of appeals and the Department of Transportation correctly concluded that Dallas would not be exercising "proprietary powers and rights," 49 U.S.C. 417123(b)(3), in restricting service at Love Field, at least absent a stronger justification for doing so than was offered by petitioners here.[14]

As the court of appeals recognized (Pet. App. 33-34), Congress has reserved an "extremely limited role * * * for airport proprietors in our system of aviation management." *British Airways Bd.* v. *Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977); see *City & County of San Francisco* v. *FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991) (observing that "[t]he federal government regulates aircraft and airspace pervasively," although reserving "a limited role for local airport proprietors" in certain areas), cert. denied, 503 U.S. 983 (1992). Any restriction on airline service that a state or local government, in its capacity as airport proprietor, imposes under Section 41713(b)(3) must be reasonable, non-arbitrary, and non-discriminatory. *National Helicopter Corp.* v. *City of N.Y.*, 137 F.3d 81, 89 (2d Cir. 1998) (citing *British Airways*, 564 F.2d at 1005). The few federal cases that have allowed an airport proprietor to allocate service between two airports primarily relied on the proprietor's need to relieve ground congestion, noise, or other environmental concerns. *Id.* at 88-89.[15]

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[14] The Department of Transportation also concluded that the proprietary powers exception of Section 41713(b)(3) is inapplicable, in any event, because Dallas is not the proprietor of DFW Airport, and thus cannot limit service at Love Field in aid of a propriety interest in DFW Airport. See Pet. App. 118-120; see p. 10 note 8, *supra*. The court of appeals found it unnecessary to reach that alternative ground for decision. Pet. App. 38-39 n.16.

[15] American Airlines cites statements made during the congressional debate on the Airline Deregulation Act that an airport proprietor could determine the "level and nature of service to be provided at airports." See

Petitioners did not advance any of those justifications for restricting airline service at Love Field. Nor did petitioners offer any other reasonable justification. Petitioners merely assert (FW Pet. 13) that DFW Airport might suffer some economic harm if additional flights are allowed from Love Field. But the Department of Transportation found that additional Love Field service would not undermine DFW Airport's position as the area's principal airport. See Pet. App. 56 (noting that "[n]o one has tried to show in this proceeding" that additional Love Field service would have such an effect). The Department's finding is clearly reasonable, especially given the Wright and Shelby Amendments, which continue to impose significant restrictions on Love Field service. As the Department noted, even if the currently proposed expansions in service occur, they would amount to a total of 360 daily flights at Love Field, "a small fraction of the 2,800 flights operated each day at DFW." *Id.* at 112-113.[16]

At bottom, petitioners are arguing that Dallas should be permitted to restrict business for Love Field simply to preserve business for DFW Airport—that is, to limit competition between the two airports in order to favor the airport

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124 Cong. Rec. 37,419-37,420, 38,526 (1978). The cited statements were made in response to specific inquiries about whether airports could continue to regulate service in order to deal with noise and other environmental problems. The statements thus do not support petitioners' claim of broad authority to limit routes and services.

[16] American Airlines also suggests (Pet. 20, 25-26) that the perceived need to limit flights from Love Field 30 years ago, when DFW Airport was established, is sufficient to justify protecting a thriving DFW Airport from competition today. But nothing in the text of Section 41713(b) suggests that a regulation, if once justified as a permissible exercise of an airport owner's proprietary rights, remains justified notwithstanding changed conditions. The Department of Transportation reasonably concluded that the relevant inquiry is whether a restriction is currently needed. See, *e.g.*, Pet. App. 111-113.

that petitioners prefer. The Department of Transportation properly concluded that such discriminatory restrictions "would be contrary to the very essence of deregulation, which is intended to promote competition." Pet. App. 106. This Court has observed that States and their political subdivisions may not, in light of the Airline Deregulation Act, impose "their own public policies or theories of competition or regulation on the operations of an air carrier." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995); see *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989) (in affirming the Department of Transportation's decision invalidating the fee structure imposed by an airport owner to discourage small aircraft from using its primary airport, the court observed that the proprietary rights exception is "not unlimited and is subject to curbing if it transgresses into the general field reserved for federal interest").

Petitioner American Airlines broadly predicts (Pet. 4-5, 11-12, 15, 18-27), without citing any factual or legal support, that the court of appeals' decision will introduce uncertainty into airport management, impede airports' ability to raise revenues in financial markets, and interfere with regional planning. But there is no reason to assume, based on American Airlines' assertions alone, that those predictions will prove accurate. To the contrary, the court of appeals did not purport to announce any new rule of law in this case; instead, the court simply affirmed the well-established rule that airports may not regulate airline routes and services, unless they demonstrate that such regulation is reasonable and necessary to protect their proprietary interests. The court did not suggest that, if a local airport authority could demonstrate that restrictions on service at one of its airports were necessary in order to preserve the economic viability of another of its airports, such restrictions would be impermissible.

b. Petitioners Fort Worth (Pet. 13-16) and American Airlines (Pet. 11-14) contend that the court of appeals' decision on the preemption issue conflicts with *Western Air Lines, Inc.* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *Arapahoe County Public Airport Authority* v. *Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). Petitioners are mistaken with respect to both decisions.

In *Western Air Lines*, the Second Circuit identified a specific problem—airport "congestion"—as a permissible reason for the Port Authority, as the proprietor of the three airports in the New York metropolitan area, to restrict long-haul flights to and from LaGuardia Airport. See 817 F.2d at 223. The Second Circuit thus did not, as petitioners suggest, recognize any general authority of local governments to allocate air traffic among airports that they own. Moreover, in its subsequent *National Helicopter* decision, the Second Circuit stated that the proprietary rights exception allows municipalities to regulate "only a narrowly defined subject matter—aircraft noise and other environmental concerns at the local level." 137 F.3d at 89. Significantly, *National Helicopter*, in disapproving local regulation of flight paths, stated that the proprietary rights exemption gives "no authority to local officials to assign or restrict routes." *Id.* at 92. There is no conflict between the Second Circuit and the Fifth Circuit on any issue presented in this case.[17]

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[17] Fort Worth also relies (Pet. 15-16) on *City of Houston* v. *FAA*, 679 F.2d 1184 (5th Cir. 1982), for the proposition that an airport proprietor may allocate long-haul and short-haul flights among its airports. In *City of Houston*, however, the federal government, not a state or local government, was the owner of the airports, Washington National Airport and Dulles International Airport. See *id.* at 1186. As the Fifth Circuit explained in this case (Pet. App. 35 n.14), the restrictions of Section 41713(b) do not apply to the federal government. Moreover, the court upheld the perimeter rule in *City of Houston* because it was a reasonable

In *Arapahoe*, an airport authority prohibited scheduled airline service at an airport where such service had never been offered. 956 P.2d at 590-591. The Colorado Supreme Court determined that the prohibition did not relate to airline services, fares, or routes, within the meaning of Section 41713(b), and thus was not subject to preemption. *Id.* at 594-595. Although the court went on to conclude that the prohibition came within the proprietary rights exception, *id.* at 595, that conclusion was not essential to the court's holding that the prohibition was not preempted. Here, in contrast, the Fifth Circuit was concerned with a restriction that indisputably *does* relate to services and routes. See Pet. App. 33 (court of appeals notes that there was "no significant argument" in this case that the 1968 Bond Ordinance related to airline services and routes). The Colorado Supreme Court expressly distinguished regulations that prohibit all scheduled passenger service at an airport, as in *Arapahoe*, from regulations that allocate long-haul and short-haul scheduled passenger service between or among multiple airports, as in *Western Air Lines* and this cases. See 956 P.2d at 595; see also *id.* at 596 n.12 (distinguishing the circumstances involv-

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means of reducing congestion at Washington National Airport and dealing with severe under-utilization of Dulles International Airport, which threatened its economic viability. 679 F.2d at 1191-1192. These proprietary objectives, however, have no application to this case. And, even if some tension existed between the decision below and *City of Houston*, this Court does not grant review to resolve intracircuit conflicts.

Fort Worth also identifies (Pet. 16-17) instances in which the Department of Transportation has considered the closing of local airports in favor of new regional airports. But the Department was acting in those instances in furtherance of its own responsibilities to administer federal aviation laws and airport programs. The decisions whether to close the local airports were not to be made by a local government unilaterally. Here, in contrast, the Department has determined that competition between the two airports in the Dallas-Fort Worth area serves the public interest and does not significantly harm DFW Airport.

ing the Centennial Airport in *Arapahoe*, "where scheduled passenger service has never been permitted," from those involving Love Field, where the proprietor sought to cut back on scheduled passenger service that had previously been offered). Accordingly, because the present case and *Arapahoe* differ so significantly in their facts and circumstances, they do not present any square conflict.[18]

c. In any event, even if petitioners' efforts to enforce restrictions on service at Love Field were not expressly preempted by Section 41713(b), they are impliedly preempted by the Wright and Shelby Amendments. The court of appeals found it unnecessary to reach that independent ground for preemption. Pet. App. 39 n.17. The Department of Transportation, however, concluded that the restrictions on Love Field service are preempted both expressly and impliedly. *Id.* at 120-127.

This Court has found implied conflict preemption "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *Geier* v. *American Honda Motor Co.*, No. 98-1811, slip op. 10 (May 22, 2000). That standard is satisfied here.

The Wright and Shelby Amendments prescribe, with specificity, the interstate service that airlines may provide at Love Field. Congress obviously did not intend in those amendments simply to give Dallas, as the proprietor of Love Field, the option to permit such service, if the city chose to

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[18] The dispute in *Arapahoe* is far from resolved. The Federal Aviation Administration recently determined that the airport owner could not ban scheduled service at the airport where the owner allowed comparable non-scheduled service. *Centennial Express Airlines* v. *Arapahoe County Pub. Airport Auth.*, FAA Order No. 1999-1 (Feb. 28, 1999). That decision is now on appeal to the Tenth Circuit. *Arapahoe County Pub. Airport Auth.* v. *FAA*, No. 99-9508.

do so. Rather, Congress sought to resolve the matter definitively. The Wright Amendment was thus described in the Conference Report as "provid[ing] a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years"—a "settlement" that "ha[d] been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Forth Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). The Shelby Amendment authorized additional service at Love Field. Congress ultimately excluded from the Shelby Amendment a proposed provision that would have given Dallas a veto over some aspects of that expanded service. See Pet. App. 126-127 (discussing provision). Congress's objective in the Wright and Shelby Amendments to allow specified interstate service from Love Field, if airlines choose to offer it, would be frustrated by local laws, such as the 1968 Bond Ordinance, that purport to disallow such service. Accordingly, as the Department of Transportation concluded, the Wright and Shelby Amendments impliedly preempt local laws restricting service at Love Field.[19]

2. Petitioners Forth Worth (Pet. 19-21) and DFW Airport Board (Pet. 12-20) challenge the court of appeals' holding that Section 41713(b) preempts the enforcement of the provisions of the Board's use agreements with individual airlines that prevent the airlines from using Love Field without the Board's consent.

As the court of appeals recognized (Pet. App. 43-47), the use agreements constitute regulation, by a local government

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[19] The Department of Transportation also concluded that local laws restricting service at Love Field are impliedly preempted because Congress sought to "occup[y] the field" of regulation of interstate service at Love Field. Pet. App. 121-122. See *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-634 (1973).

entity, of air carriers' routes and services. The relevant provisions of the use agreements "are essentially coextensive with the [1968 Bond] Ordinance," were designed to implement the service restrictions contained in the Ordinance, and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance." *Id.* at 45. Consequently, the court of appeals correctly held that the use agreements are preempted for the same reasons, and to the same extent, that the 1968 Bond Ordinance is preempted.[20]

Contrary to petitioners' assertions (FW Pet. 19-21; DFW Pet. 12-14), the court of appeals' decision does not conflict with this Court's decision in *Wolens* with respect to the reach of Section 41713(b). In *Wolens*, the Court held that Section 41713(b) "allows room for court enforcement of contract terms set by the parties themselves" in "suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 222, 228. There, the airlines themselves had imposed the contract obligations, which related to frequent-flyer programs for airline passengers. The Court concluded that Section 41713(b) did not preclude enforcement of those "privately ordered obligations." *Id.* at 228.

This case, in contrast to *Wolens*, concerns contract obligations that were imposed by a local government entity, not a private party, and that were designed to effectuate a local law, not private "business judgments." 513 U.S. at 229. The

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[20] Petitioner DFW Airport Board argues (Pet. 17-20) that, even if the 1968 Bond Ordinance is preempted, it does not follow that the use agreements are preempted, simply because those agreements refer to the Ordinance. But the use agreements do more than refer to the Ordinance. The purpose of the consent provision of the use agreements is to enforce a government policy by restricting airlines to the routes favored by the cities and the Board.

Wolens Court expressly distinguished such "state-imposed obligations" from the private obligations at issue in that case. *Id.* at 222, 228. Otherwise, a state or local government entity, such as the DFW Airport Board here, could readily circumvent Section 41713(b) by enforcing "price, route, or service" restrictions though contract, rather than through statute.[21]

Finally, although petitioner DFW Airport Board claims (Pet. 19) that the applicability of Section 41713(b) to use agreements between airport operators and individual airlines is "a far-reaching issue of nationwide importance," petitioners do not cite *any* decision of *any* court that addresses that issue.[22] The dearth of such decisions confirms that the issue is not, at least at this time, of sufficiently recurring significance to warrant this Court's review.

3. Petitioner Fort Worth contends (Pet. 22-26) that the Department of Transportation was required to give pre-

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[21] Petitioners note (FW Pet. 21; DFW Pet. 16) that this Court in *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218 (1993), drew a distinction, for purposes of implied preemption analysis under the National Labor Relations Act, between a State's acts in a regulatory capacity and a State's acts in a proprietary capacity. See also *Associated Gen. Contractors* v. *Metropolitan Water Dist.*, 159 F.3d 1178 (9th Cir. 1998) (case cited by petitioner DFW Airport Board drawing such a distinction with respect to express preemption analysis under ERISA). But such cases do not resolve the question whether the DFW Airport Board was engaging in regulation, as opposed to appropriate proprietary activity, in imposing a contract requirement that prevents signatory airlines from using Love Field without the Board's consent. Moreover, to the extent that the analysis of whether a state government's action is proprietary or regulatory is informed by whether private parties engage in such action, see *Building & Constr. Trades Council*, 507 U.S. at 228-229, private parties do not ordinarily dictate which airports an airline may use.

[22] We are informed by the Department of Transportation that very few other airports attempt to enter into use agreements that require an airline to obtain the airport's consent to use another airport in the area.

clusive effect to the state trial court's December 1998 judgment in *City of Fort Worth*, which held that the restrictions on Love Field service contained in the 1968 Bond Ordinance "are not preempted by federal law, and are valid and enforceable." Pet. App. 179. This issue may well be of no continuing significance. On May 25, 2000, the state court of appeals, which had stayed the appeal in *City of Fort Worth* pending the Fifth Circuit's decision in this case, reversed the trial court's judgment. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV, slip op. at 1-2, 30-31 (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).[23] In any event, contrary to petitioner Fort Worth's assertions, neither 28 U.S.C. 1738 nor federal common-law rules of preclusion required the Department of Transportation to defer to the state trial court's judgment.

Section 1738 provides, in pertinent part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken." Section 1738, by its terms, thus requires only that "court[s] within the United States," but not federal agencies, accord "full faith and credit" to the judgments of state courts. Consequently, the statute had no application to the Department of Transportation's administrative proceedings in this case. As the court of appeals noted (Pet. App. 17-18), the only other circuit that has fully considered the question reached the same conclusion. See *NLRB* v. *Yellow Freight Sys., Inc.*, 930 F.2d 316, 320 (3d Cir.) (Section 1738 did not require the NLRB to give preclusive effect to a state

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[23] The court of appeals concluded, *inter alia*, that "the restrictions on Love Field air passenger service contained in the [1968] Bond Ordinance are preempted by the [Airline Deregulation Act]." *Legend Airlines*, slip op. 30.

arbitrator's decision because the NLRB is an agency, not a court), cert. denied, 502 U.S. 820 (1991); cf. *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794-796 (1986) (Section 1738 governs only the preclusive effect to be given to judgments of state "courts," and thus does not apply to unreviewed state administrative decisions). The decision on which petitioner Fort Worth principally relies, *Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs*, 125 F.3d 18 (1st Cir. 1997), is not to the contrary. In that case, the First Circuit recognized, in accordance with *Elliott*, that Section 1738 had no application to that case, which concerned the preclusive effect to be given to a state administrative decision. The court instead relied on non-statutory preclusion doctrines in determining the effect to be accorded that decision. See *id.* at 21.[24]

As for common-law preclusion, this Court has declined to hold that the federal government is precluded by a prior adjudication in circumstances where doing so could undermine important national interests. See *Heck* v. *Humphrey*, 512 U.S. 477, 488-489 n.9 (1994) (citing *United States* v. *Mendoza*, 464 U.S. 154 (1984)). Such interests are implicated where, as here, preclusion would constrain a federal agency

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[24] Petitioner Fort Worth's other claims of a circuit conflict are equally without merit. In *Town of Deerfield* v. *FCC*, 992 F.2d 420 (2d Cir. 1993), the court of appeals did not hold that the FCC was required, by Section 1738 or otherwise, to defer to a state court judgment; rather, the court held that the FCC was required to accord preclusive effect to an earlier federal court judgment. In *Midgett* v. *United States*, 603 F.2d 835, 845 (Ct. Cl. 1979), the Court of Claims did not hold that the agency was required to give preclusive effect to a state court's decree of death; rather, the court stated that the agency should have considered the decree as prima facie evidence of death, suggesting that the decree was entitled to such treatment only because it was issued in a proceeding in rem. *Id.* at 846. The court ultimately held that the agency's decision was arbitrary and capricious, whether or not the state court decree was given full faith and credit. *Id.* at 846-849.

in interpreting statutes that Congress has charged the agency to administer. As the court of appeals observed (Pet. App. 21), this case "involves aviation regulation, an area where federal concerns are preeminent and where [the Department of Transportation] is charged with representing those concerns." More specifically, the case "involves the operation of flights from Love Field, a matter on which Congress has twice specifically legislated." *Ibid.* And the Department was not a party to the state court proceedings. In such circumstances, the Department was not required to defer to the determinations of a state trial court, with no expertise in, or responsibility for, aviation regulation, simply because the state court issued its (now reversed) decision one week before the Department issued its own decision.

4. Petitioner DFW Airport Board challenges (Pet. 20-29) the Department of Transportation's decision, affirmed by the court of appeals, that airlines may offer through service from Love Field to ultimate destinations outside the seven-state area, if the travel begins with a flight from Love Field to an intermediate Texas destination on a "commuter aircraft" (*i.e.*, one with a capacity of no more than 56 passengers). The court of appeals, after determining that Congress did not speak directly to this question, held that the Department reasonably interpreted the Wright and Shelby Amendments as allowing such service. Pet. App. 50. The court of appeals' application of the mode of analysis articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the particular facts and circumstances of this case does not warrant this Court's review.

Here, the Department of Transportation assumed, and no party disputed, that the Wright Amendment does not bar through service that commences with a flight on a commuter

aircraft between Love Field and a point outside Texas.[25] The only difference here is that the initial leg of the flight would be between Love Field and a point inside Texas. The Department concluded that Congress did not intend to treat Love Field flights on commuter aircraft differently, with respect to the availability of through service, depending on whether the flight ended inside or outside Texas. As the court of appeals held (Pet. App. 50-52), the Department's conclusion was reasonable and consistent with the Wright and Shelby Amendments.

The court of appeals' decision does not, as petitioner DFW Airport Board asserts (Pet. 24, 28), conflict with *Continental Air Lines* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1986). The two cases address different questions. In *Continental Air Lines*, the court of appeals affirmed the Department of Transportation's determination that the "through service" restriction in subsection (c) of the Wright Amendment did not prevent an airline from operating between Love Field and Houston, simply because the airline provided through service or ticketing with another carrier on its other flights. *Id.* at 1445-1154. The court also affirmed the Department's conclusion that subsection (a) of the Wright Amendment allows all airlines, not merely commuter airlines, to operate interstate flights from Love Field in aircraft with a capacity of no more than 56 passengers. *Id.* at 1454-1455. Neither issue is raised in this case.[26]

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[25] As the court of appeals explained (Pet. App. 50-52), subsection (a) of the Wright Amendment, which allows interstate service from Love Field on commuter aircraft, contains no restriction on through service; subsection (c), which does contain a prohibition on through service, does not apply to commuter aircraft, but only to "large jets" (*i.e.*, aircraft with a capacity of more than 56 passengers).

[26] Petitioner DFW Airport Board also notes (Pet. 21-22) that another portion of the Department of Transportation's order that was reviewed in *Continental Air Lines* concluded that an airline could not provide flights

CONCLUSION

The petitions for a writ of certiorari should be denied.

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from Love Field, with an intermediate stop in Houston, to points outside the four contiguous States identified in the Wright Amendment. See Order No. 85-12-81, 1985 WL 57886, at *10-11 (Dec. 31, 1985). The Department's earlier ruling, which was concerned only with whether such service could be provided on large jets (*i.e.*, aircraft with a capacity of more than 56 passengers), construed subsection (c) of the Wright Amendment. The ruling in this case, which was concerned with whether such service could be provided on commuter aircraft, construed subsection (a) of the Wright Amendment. There is no inconsistency between the two agency rulings.

No. 99-1739

IN THE

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,
Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

The questions presented in the Cross-Petition filed by the Dallas-Fort Worth International Airport Board ("Board") do not warrant review at this time. The first question – whether the Board's use agreements are preempted by the Airline Deregulation Act ("ADA") – is wholly derivative of the single question presented in the Petition filed by American Airlines, Inc. ("American") (No. 99-1745), which is whether the ADA's preservation of the "proprietary powers and rights" of local governments that own multiple airports allows such governments to allocate particular types of air traffic to specific airports. If this Court grants American's Petition, there will be no need to resolve the first question raised by the Board. If the Court reverses the Fifth Circuit, that action will moot the issue

of the enforceability of the use agreements. And if the Court affirms the Fifth Circuit, that action will effectively nullify section 3.2 of the use agreements as well, for that section does no more than implement the legal requirements the Fifth Circuit held were preempted. As to the Cross-Petition's second question, regarding the Department of Transportation's ("DOT's") construction of the Wright Amendment, the Fifth Circuit's conclusion neither creates a decisional conflict among courts nor raises any issues of national importance.

The best course of action, American respectfully suggests, is to hold the Board's Cross-Petition, as well as the Petition filed by the City of Fort Worth (No. 99-1462),[1] and to grant review on the single question presented in American's Petition because that issue is unquestionably one of nationwide importance on which both the circuits and the Colorado Supreme Court are in conflict. The remaining petitions then can be disposed of as appropriate in light of the Court's disposition of American's Petition.

STATEMENT OF THE CASE

Seeking to portray the use agreements between itself and the major commercial airlines as garden-variety private contracts that are not subject to ADA preemption, the Board glosses over the context in which the use agreements arose. Those agreements are no more akin to private contracts than was the earlier agreement between Dallas and Fort Worth in

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[1]The City of Fort Worth raised three issues in its Petition. The first is the same as the single issue raised in American's Petition. The second is the same as the use agreement issue raised in Board's Cross-Petition. The third involves the preclusive effect of a Texas state court ruling applying the ADA's "proprietary powers and rights" provision to the matters at issue in this case.

1968 – entered into at the behest of the Civil Aeronautics Board ("CAB") – to jointly finance and build DFW Airport, to create the Board to operate DFW Airport on the cities' behalf, and to transfer scheduled passenger service to DFW Airport from the cities' then-existing airports, including Love Field. (American Pet. 5-7). To the contrary, the use agreements were part and parcel of the cities' regional planning effort, which was itself a product of pressure from federal authorities to consolidate passenger service at a single airport (as the Board acknowledges, *see* DFW Board Cross-Pet. at 6-9).

Indeed, the use agreements were critical to implement this consolidation effort. Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance ("Ordinance"), which Dallas and Fort Worth concurrently enacted in furtherance of their venture, obliged the cities to

> take such steps as may be necessary, appropriate, *and legally permissible* . . . to provide for the orderly, efficient and effective phase-out at Love Field . . . of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport [*i.e.*, DFW Airport] effective upon the beginning of operations at the Regional Airport.

(American Pet. App. 162a) (emphasis added). At the time of the Ordinance's enactment in 1968, eight federally certificated airlines, including American, provided scheduled passenger service under long-term leases at Love Field. To assure that the CAB-required transfer of scheduled passenger service would occur and that the revenues necessary to finance DFW Airport's debt service and operations would be achieved, the Board in 1970 required each of those federally certificated airlines to execute a Letter Agreement committing to "conduct

[Certificated Air Carrier] services to, from, and at [DFW] Airport to the extent required under the terms of the [Ordinance]" (American Record Excerpts, Tab 14 at 4 (5th Cir. filed July 19, 1999)). This language was the same as that which now appears in section 3.2 of the use agreement. Specifically, section 3.2 provides that the "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth areas to, from and at the [DFW] Airport, to the extent required by the terms of the . . . Ordinance." (American Pet. App. 41a). As this plain language reveals, the use agreements do *not* require the signatory airlines to operate all of their services at DFW Airport. Rather, they require the airlines to do so only to the extent required by the Ordinance.

REASONS FOR HOLDING THE CROSS-PETITION

1. Insofar as it challenges the Fifth Circuit's determination that the use agreements are preempted, the Board's Cross-Petition should be held because it is wholly derivative of the question presented in American's Petition. The Board does not dispute that the use agreements were "enacted to effect the Ordinance," (American Pet. App. 41a) and, just like the Ordinance, were designed to limit services at Love Field. The Fifth Circuit concluded that, because the Ordinance's restrictions on operations at Love Field exceeded the scope of the cities' "proprietary powers and rights" within the meaning of section 41713(b)(3) of the ADA, 49 U.S.C. § 41713(b)(3), such restrictions were preempted by section 41713(b)(1) of the ADA, 49 U.S.C. § 41713(b)(1). Because the Ordinance was preempted, the Fifth Circuit reasoned, section 3.2 of the use agreements, which required nothing more than compliance with the Ordinance, also exceeded the cities' proprietary powers and similarly was preempted. (American Pet. App. 41a). Accordingly, the Fifth Circuit's decision as to section 3.2 of the

use agreements followed directly from its decision as to the Ordinance.

This Court's resolution of the threshold question whether the Ordinance is preempted thus will dramatically affect the disposition of the Board's Cross-Petition. If the Court were to reverse the Fifth Circuit, as we believe it should, the first question would be moot. If the Court were to affirm the Fifth Circuit's decision, the question whether the ADA preempts section 3.2 of the use agreements – which does no more than require airlines to offer services "to the extent required by the terms of the . . . Ordinance" (American Pet. App. 41a) – would again be rendered insignificant because the Ordinance would be nullified. In sum, the use agreement issue adds nothing to the Court's ability to resolve the underlying preemption question except a needless layer of complexity.

2. The Board's claim that the use agreements were an exercise of proprietary rights does not create an independently reviewable issue. Although tacitly recognizing that the Ordinance and the use agreements were part and parcel of the cities' plan to reallocate the bulk of interstate passenger services to DFW Airport, the Board attempts to decouple the use agreements from the Ordinance by asserting that the former establish contractual obligations between the parties, contain terms not found in the Ordinance, and represent "permissible proprietary action" by the cities rather than an "impermissible attempt to regulate." DFW Board Cross-Pet. at 17; *id.* at 18 (use agreements were not "an act of government regulation"); *id.* at 19-20 (use agreements were "nonregulatory, proprietary contracts reflecting the circumstances unique to an airport such as DFW"). But the question is not whether the use agreements' provisions are labeled as "proprietary." Rather, the question is whether section 3.2 of the use agreements represents an

exercise of the cities' proprietary powers *even if* the Ordinance does not. In other words, the question is whether section 3.2 of the use agreements can meaningfully be distinguished from the underlying requirements of the Ordinance itself. Because both the Ordinance and the use agreements seek to achieve exactly the same goal – namely, restricting passenger service from Love Field – the answer to that question is no.

Nothing in *Associated General Contractors of America v. Metropolitan Water District*, 159 F.3d 1178 (9th Cir. 1998), or *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993), bolsters the Board's effort to decouple the Ordinance from the use agreements. To be sure, both cases (i) recognized that not every action of a state is tantamount to regulation and, (ii) drew careful distinctions between a state acting as any party might act, *e.g.*, to manage its own property, and a state acting in a regulatory capacity. *See Building & Construction Trades Council*, 507 U.S. at 231-32 (allowing government to require prospective contractors to adhere to a labor agreement as a condition of performing a project on government-operated land because Congress did not preclude government from "manag[ing] its own property when it pursues its purely proprietary interests" and because "analogous private conduct would be permitted"); *Associated General Contractors*, 159 F.3d at 1183 (same). The Fifth Circuit was well aware of this distinction and the cases on which the Board relies.[2] Again, however, these cases deal only with

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[2]*See* American Pet. App. 40a-41a (recognizing that "the case law distinguishes between actions a state or municipality takes in a proprietary capacity . . . and actions a state or municipality takes that are attempts to regulate," citing, *e.g.*, *Building & Trades Council* and *Associated Gen. Contractors*).

circumstances in which the government acts as a proprietor. They do not explain why, if the use agreements are no more than a mechanism by which an airport owner controls the traffic into its airport, the Ordinance is not also such a mechanism to precisely the same extent. In short, the cases on which the Board relies stand for the unremarkable proposition that not everything a city does is tantamount to regulation, and do not remotely suggest that the use agreements are "proprietary" for some reason that the Ordinance is not.

At bottom, the Board's Cross-Petition raises the same question that American's Petition raises: whether cities that own multiple airports in a single region are precluded by the ADA from designating one of those airports as the principal locale for commercial traffic in the area. That the action the Board challenges takes the form not of a local ordinance, but of an agreement to adhere to the local ordinance, is irrelevant. *See, e.g.*, *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1062 (9th Cir. 1987) ("[A] city may not use the guise of privity of contract to conduct otherwise forbidden regulatory activity."). Regardless of the form that a governmental action takes, the question remains whether such action is "proprietary" rather than "regulatory."

3. Nothing in this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), suggests that section 3.2 of the use agreements would avoid preemption if the relevant provisions in the Ordinance are held to be preempted. *Wolens* involved state-court suits by participants in American's frequent-flyer program alleging that American violated a state consumer-fraud statute and breached its contract with program participants by altering the program retroactively in such a way as to devalue the utility of frequent-flyer credits that the

plaintiffs already had accumulated. Although both the statutory claim and the contract claim arose from the same set of operative facts, and although both claims clearly related to price within the meaning of 49 U.S.C. § 41713(b)(1), the Court concluded that only the former claim was preempted by the ADA. 513 U.S. at 222. The Court explained that the consumer-fraud claim was preempted because the statute, even though a law of general applicability, "serves as a means to guide and police the marketing practice of the airlines." *Id.* at 228. The contract claim, however, escaped preemption because the terms and conditions of the frequent-flyer program were "self-imposed undertakings" for marketing purposes, *id.* at 228-29, and thus did not amount to the "enact[ment] or enforce[ment]" of "a law, regulation, or other provision having the force and effect of law" under 49 U.S.C. § 41713(b)(1). The Court concluded:

> The ADA's preemption clause . . . stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

513 U.S. at 232-33.

The Board, seizing on the distinction the Court made in *Wolens* between the fraud claim and the contract claim, asserts that the Fifth Circuit's conclusion that the use agreements are preempted "directly conflicts" with *Wolens*. DFW Board

Cross-Pet. at 13. According to the Board, *Wolens* dictates that the use agreements are enforceable because "voluntary, self-imposed contracts are not preempted by the ADA." *Id.* But the Board's suggestion that the obligations imposed by the use agreements were "voluntarily" assumed by the airlines is absurd. As the Board itself made clear in its Cross-Petition (at 6-9), the decision to relocate scheduled passenger traffic from Love Field to DFW Airport was a result of federal compulsion. The major carriers "agreed" to execute Letter Agreements – the forerunners of the use agreements – committing not to use Love Field only because the Board required airlines to execute such Agreements as a condition of using DFW Airport for passenger service. Had they not done so, these carriers effectively would have been foreclosed from the market. The Board's characterization of the carriers' agreements with the cities as "arms-length business transactions voluntarily made" thus ignores the fact that the use agreements were part and parcel of the Board's and cities' broader (and federally mandated) efforts to relocate commercial service to DFW Airport.

In any event, the Board's Cross-Petition rests on a serious misreading of both the holding and the analysis of *Wolens*. That case did not purport to adopt a categorical distinction between breach-of-contract claims and other state-law claims.[3] Rather, this Court's focus was on whether the claim – whatever its form – could be resolved without allowing the State to impose its own substantive standards or policies with respect to rates, routes, or services. *Wolens*, 513 U.S. at 232. If a State lacks the power to impose a certain regulation, it

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[3]Indeed, the Ordinance, which the Fifth Circuit found preempted, was itself the product of an agreement between the cities of Dallas and Fort Worth.

cannot evade preemption merely by incorporating the forbidden regulation into a contract. *See, e.g., Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) ("[W]hen contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."); *accord Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 692 (5th Cir. 1999) (recognizing that a government entity's use of contracting power to advance regulatory goals is preempted under NLRA and ERISA).

Moreover, even if *Wolens* had adopted a bright-line distinction between contract claims and other state-law claims, the Fifth Court's analysis still is perfectly consistent with *Wolens*. Even where a breach-of-contract claim is asserted, the *Wolens* Court emphasized, such a claim would be preempted if its resolution turned on an interpretation of "state laws or policies external to the agreement." 513 U.S. at 233. Here, the alleged contractual obligation undertaken by the airlines pursuant to section 3.2 of the use agreements was *not*, contrary to the Board's suggestion, to move their operations to DFW Airport. Rather, the airlines agreed merely to adhere to the terms of the Ordinance. The Ordinance, in turn, required the transfer of services from Love Field to DFW Airport, but only to the extent such transfer was "*legally permissible*." (American Pet. App. 162a) (emphasis added). The Fifth Circuit concluded that the ADA preempted the cities' ability to effect such a transfer under the Ordinance. It necessarily follows that no legally enforceable obligation arises under section 3.2 of the use agreements. *See, e.g., Nelson v. American Nat'l Bank*, 921 S.W.2d 411, 417 (Tex. App. 1996) (a preempted law is void and without effect). Accordingly, any attempt by the Board to prevent airlines from flying into Love Field would not be based

on the terms of the use agreements, but rather would be an "enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233.

Even under the Board's misreading of *Wolens*, then, the resolution of the question presented by American – whether the Ordinance is preempted – entirely controls the question whether section 3.2 of the use agreements is preempted. As a result, this Court should hold the Board's petition on this issue pending its resolution of the threshold question posed by American.

4. American does not disagree with the Board's claim that DOT's interpretation of subsection (a)(2) of the so-called Wright Amendment[4] is in error. Nevertheless, the Fifth Circuit's decision in this case neither conflicts with any decision of this Court or any court of appeals, nor raises any issue of nationwide importance, and thus does not warrant review at this time.

CONCLUSION

For the foregoing reasons, this Court should hold the Board's Cross-Petition pending resolution of American's petition.

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[4]Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35, 48 (1980).

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v.

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On Petition and Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CORPORATE DISCLOSURE STATEMENT

Continental Express, Inc. is wholly owned by its parent, Continental Airlines, Inc., which is a publicly held corporation.

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IN THE

Supreme Court of the United States

Nos. 99-1739; 99-1745

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,
Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

AMERICAN AIRLINES, INC.,
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition and Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF CONTINENTAL EXPRESS, INC.

COUNTER-STATEMENT OF THE CASE AND THE ISSUE ADDRESSED HEREIN

The petition of American Airlines, Inc. in No. 99-1745 and the cross-petition of the Dallas Fort Worth International Airport Board in No. 99-1739 set forth essentially the same arguments concerning the preemption issue decided by the Fifth Circuit as are raised by the petition filed by the City of Fort Worth in its petition in No. 99-1462. On that issue,

Continental Express hereby adopts and reasserts the points made in its Opposition to the Petition for Certiorari filed in No. 99-1462.

The Cross-Petition of Dallas-Fort Worth International Airport Board and the Response of Southwest Airlines Co. to that cross-petition in No. 99-1739 raise an additional issue concerning the deference to be afforded the Department of Transportation in its interpretation of the Wright Amendment with respect to the carriage of through and connecting passengers on commuter airline flights operated at Love Field. Continental Express responds to this additional argument below.

REASONS FOR DENYING THE WRIT

Alone among the petitioners, the Dallas-Fort Worth International Airport Board ("DFW") has asked the Court to review the Fifth Circuit's affirmance of the Department of Transportation ("DOT") decision that the Wright and Shelby Amendments permit passengers on unrestricted flights by "commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" to operate between Love Field and points within Texas to connect to and from other flights without restriction, and Southwest Airlines Co. ("Southwest") has supported the DFW petition. Neither the DFW cross-petition nor the response presents any reason for this Court to review the Fifth Circuit's decision below.

First, the Wright and Shelby Amendments apply to flight operations at only one airport: Love Field. Thus, the Fifth Circuit's decision on through and connecting service applies only to flights operated at one airport and cannot be of such national significance to merit plenary review.

Second, unlike the other issues raised by petitioners, this through-ticketing issue was neither addressed in the Texas courts nor raised in the original Texas action brought by

Petitioners. Thus, there is no conflict between any Texas state court decision and the decision of DOT and the Fifth Circuit on this issue.[1]

Finally, knowing there is no issue of national importance involved, and knowing there is no state-federal conflict presented, DFW and its supporter, Southwest, seek to elicit grant of certiorari by creating a conflict between the Fifth Circuit and the D.C. Circuit where none exists.

When Congress adopted the Wright Amendment restricting service at Love Field, it permitted service at Love Field under two independent, alternative conditions: section (a) permits unrestricted flights at Love Field with relatively inefficient small commuter aircraft while section (b) permits large-aircraft operations restricted to a narrow geographic area without the ability to offer through or connecting service beyond that area. DFW and Southwest now argue, as they have done unsuccessfully before in court and at DOT, that these conditions are cumulative: operators of small aircraft must also be precluded from offering passengers through or connecting service. DFW and Southwest ask this Court to review this narrow issue based on erroneous arguments that the DOT decision affirmed by the Fifth Circuit conflicts with a prior D.C. Circuit decision deferring to DOT's previous,

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[1] There is also no longer a conflict between the DOT and Fifth Circuit decisions and decisions of the Texas courts regarding the scope of nonstop operations with commuter aircraft at Love Field or preemption of restrictions by the Airline Deregulation Act ("ADA") in light of the state appellate court's decision that flights on commuter aircraft can operate "to or from Love Field without geographical limitation" and that "enforcement . . . of the Bond Ordinance restrictions at Love Field is not a permissible exercise of proprietary powers under the ADA." (*See Legend Airlines v. City of Fort Worth*, No. 2-99-098-CV, Court of Appeals, Second District of Texas, Fort Worth, May 25, 2000 at 30-31, 25-26 (lodged with the Court).

similar, interpretations of the Wright Amendment and congressional intent in adopting the Wright Amendment.

In 1985, DOT noted that it "is clear that usual ticketing, scheduling and ratemaking practices would not be . . . affected, beyond the specific Love Field restrictions" and that "operations . . . using small aircraft are exempt from the [Wright] Amendment with respect to Love Field operations."[2]

Although DOT has concluded that operations with small aircraft are entirely exempt from the Wright Amendment's restrictions, it decided, in a separate section of its 1985 decision, that operators of *large* aircraft offering *intrastate* service at Love Field were not exempt from the Wright Amendment and could not "offer, promote or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point." (Order 85-12-81, App. 1 at 19a) because the service would cease to be "intrastate."

When the D.C. Circuit reviewed DOT's 1985 decision, and Southwest claimed then (as now) that "DOT's interpretation leaves a gaping loophole in the statutory scheme because it allows large airlines to use small aircraft as 'feeders' for interstate operations," the D.C. Circuit rejected Southwest's argument and concluded that the Department's interpretation was entitled to deference. (*Continental v. DOT*, 843 F. 2d 1444 at 1454 (D.C. Cir. 1988) When the D.C. Circuit affirmed the separate DOT conclusions regarding small commuter aircraft service and intrastate large aircraft service, it made no decision whatsoever precluding airlines operating

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[2] Order 85-12-81, App. 1 at 8a, 11a-18a. Although DFW included parts of DOT Order 85-12-81 in its Appendix, it omitted sections relevant to the issues raised here. Continental Express has therefore included a copy of the entire decision in its Appendix.

small commuter aircraft from offering through or connecting service on their Love Field flights.

Although the D.C. Circuit confirmed DOT's interpretation in part because it was consistent with the purpose of the Wright Amendment to limit Love Field to short-haul service, the primary basis for confirming DOT's interpretation was the D.C. Circuit's disagreement with Southwest's restrictive interpretation of the "commuter airline" definition. (*Continental v. DOT*, 843 F. 2d 1444 at 1454-1455. Subsequent enactment of the Shelby Amendment to permit operations at Love Field with larger aircraft (reconfigured to 56 seats or less) capable of offering nonstop service between Love Field and any point in the contiguous United States clearly evidences a more recent congressional intent to permit long-haul service at Love Field pursuant to the commuter exception in Section (a) of the Wright Amendment.[3]

There is simply no conflict between these two Court of Appeals decisions, rendered eleven years apart, with a further congressional directive regarding expanded operations by commuter aircraft enacted in the interval between the decisions.

DFW and Southwest have presented no reason for this Court to review the Fifth Circuit's decision that affirms DOT's interpretation that the Wright and Shelby amendments permit Continental Express to operate commuter aircraft at Love Field connecting to and from other flights at Houston. The statutory provision interpreted by DOT and the Fifth

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[3] As the Texas appellate court said in *Legend v. City of Fort Worth*, "A plain reading of the Shelby Amendment . . . shows that congressional intent has shifted toward allowing commuter airlines to operate many types of aircraft out of Love Field that are capable of providing long-haul service. Appellees' narrow definition of commuter airlines would frustrate this clear intent and render the express language of the Shelby Amendment meaningless." (at 29)

Circuit is unique to Love Field; there is no conflict between DOT and the Fifth Circuit, on the one hand, and any Texas court decision, on the other hand; and there is no conflict between the D.C. Circuit and the Fifth Circuit on this issue. There is no reason for this Court to take review of this issue.

CONCLUSION

The petition in No. 99-1745 and the cross-petition in No. 99-1739 for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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May 31, 2000

APPENDIX

Order 85-12-81

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 31st day of December 1985

Docket 43307

LOVE FIELD AMENDMENT PROCEEDING

ORDER

By Order 85-7-65 (July 26, 1985), the Department requested comments on the interpretation of the Love Field Amendment (Amendment) (Sec. 29, International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35 (1980)), which restricts service by air carriers at Love Field, Texas.[4] Our request for comments followed announcement by Continental Airlines of its intention to commence service at Love Field and opposition of various persons to this service. On July 10, 1985, the Dallas/Fort Worth (DFW) Parties[5] submitted a letter to the Department's Office of Aviation Enforcement and Proceedings seeking an informal enforcement investigation and order prohibiting Continental's proposed service.

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[4] The question of proper interpretation of the Love Field Amendment was previously raised in the *Southwest Airlines – Muse Air Acquisition Proceeding*, where the Department found it unnecessary to reach the issue in its decision. Order 85-6-79 (June 24, 1985). We did, however, suggest that the issue should be resolved in another context. *Id.*

[5] The DFW Parties are the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth International Airport Board.

In view of the current dispute regarding Love Field service, and because the issue is primarily a question of law, we asked for comments to assist us in interpreting the Amendment. Responders were asked to specifically address the questions of whether an air carrier can serve Love Field on a non-interline basis, if the carrier interlines elsewhere on its system; and whether the Amendment applies to intrastate service. We received comments and reply comments from: Air Midwest, America West Airlines, Continental Air Lines, the Dallas/Fort Worth Parties, Delta Air Lines, the Department of Justice, the Regional Airline Association, Republic Airlines, and Southwest Airlines, Co., and several letters from the general public. In addition to comments concerning statutory interpretation, several parties raised related questions about marketing of Love Field services in a manner consistent with provisions of the Amendment. We have considered all comments and have also taken notice of Orders 80-3-9, 80-5-12, 80-8-181, and 80-12-102 of the Civil Aeronautics Board, the pleadings in *City of Dallas v. CAB*, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980), and the legislative history of the Amendment in interpreting its meaning.

After careful review of these matters, the Department has decided that: 1) Continental's proposed service between Love Field and Houston, Texas, does not violate the Love Field Amendment; 2) the Amendment does not apply to flights by intrastate carriers or intrastate service by an "air carrier"; 3) upon the request of passengers, Continental or its agents may sell "double tickets" to passengers continuing on a different aircraft and flight beyond an authorized destination from Love Field; 4) however, neither Continental nor its agents may list in any manner, including a computer reservation system, a flight from Love Field as a "connection" to a point beyond the Love Field authorized service area; 5) Delta, or any other airline, may list in its computer reservation system flights from Love Field by a

certificated carrier using small aircraft in the same manner as commuter carrier flights; and 6) intrastate and air carriers may provide service between Love Field and other points within the state of Texas so long as they do not use this service to avoid the Love Field Amendment's restrictions on interstate air service.

BACKGROUND

Since the completion of Dallas/Ft. Worth Regional Airport (DFW), which resolved a long-standing rivalry between Dallas and Ft. Worth for interstate service to their communities, the DFW Parties have sought to prohibit interstate service at other area airports. The DFW Parties, in fact, previously asked the CAB to prohibit interstate service at area airports other than DFW, especially Love Field. The CAB refused to do so. The DFW Parties' argument for this prohibition in the years immediately following completion of the regional airport was that interstate operations at Love Field would damage the viability of the new airport. *See* Order 79-9-192 (September 28, 1979).

In addition, the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1705 (1978)) substantially changed the Federal government's regulatory oversight of air transportation. In particular, the Act includes a provision, as part of the listing of public interest elements, concerning the use of satellite airports and the power of regional authorities over their use. Section 102(a)(6), 49 U.S.C. 1302(a)(6). Some members of the House of Representatives apparently believed this provision would prohibit the CAB from authorizing interstate service at Love Field, but the Conference Report on the subsequently passed Love Field Amendment indicates the Senate did not share this view. S. Rep. No. 96-531, 96th Cong., 1st Sess. (1980) [hereafter, Conference Report]. The Deregulation Act also includes provisions, known as the Automatic Market Entry (AME)

program, that allowed carriers to enter certain markets prior to complete route deregulation without a CAB finding that entry was needed. Section 401(d)(7), 49 U.S.C. 1371(d)(7). Under the AME provisions, the CAB ruled that Southwest Airlines could provide interstate service from Love Field, notwithstanding section 102(a)(6). Order 79-9-192 (September 29, 1979).

Congress subsequently addressed the dispute respecting service at Love Field in an amendment to the International Air Transportation Competition Act (IATCA). Congressman Jim Wright initially introduced an amendment to IATCA, pass[illegible] by the House, that effectively prohibited all interstate air service at Love Field. However, the Senate version of IATCA contained no similar provision. The Conference Committee adopted a compromise solution to settle the controversy, producing the current Love Field Amendment. It rejected Congressman Wright's total ban on interstate air service at Love, but imposed substantial restrictions. Subsection (a) of the Amendment prohibits the CAB or its successor from authorizing interstate service (other than limited charter and commuter flights) to Love Field, except in accordance with remaining provisions of the Amendment. Subsection (b) prohibits interstate scheduled service at Love Field, except in accordance with other provisions of the Amendment, or if such service was operated before November 1979. This section assured that Southwest could continue to operate Love Field service the CAB had previously authorized. Subsection (c) defines the scope of permissible service as follows:

> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through

> service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such state. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, and any other officer or employee of the United States, or any other person.

Continental does not plan on operating from Love Field beyond the five-state area specified in (c), an action which would be clearly prohibited. Rather, Continental plans to serve Love Field with flights to Houston. Continental has interline agreements with other carriers and provides interline service at its Houston hub. Thus, in interpreting the Amendment, we must interpret the interline prohibition contained in (c)(1) to determine whether the Amendment should be construed to prohibit a carrier that interlines elsewhere on its system from serving Love Field, or whether it should be construed merely to prohibit interlining in connection with service at Love Field.

The Dallas-Ft. Worth Parties and Southwest argue that the Amendment prohibits service at Love Field by carriers that interline anywhere on their systems, even if no interline service is provided on flights serving Love Field. The Justice Department disagrees, arguing that Congress' intent in enacting the Amendment was to prohibit interlining only in connection with Love Field service. Justice notes that this view is consistent with prior CAB interpretations of section (c)(1).

The CAB's most detailed interpretation of the interline prohibition occurred in connection with an airport notice filed in 1980 by Texas International Airlines (TI) to inaugurate

interstate service from Love Field.[6] The airport notice was opposed by Southwest and the DFW Parties on the grounds that the Amendment prohibited Love Field service by interlining carriers, such as TI, even if the carrier did not provide interline service from Love.[7] The CAB disagreed and permitted TI to institute the proposed interstate service. Interpreting the Amendment as restricting interlining on flights serving Love Field, rather than as a total prohibition on serving Love Field by carriers that interline elsewhere on their systems. Order 80-8-181 (August 29, 1980).[8] The DFW Parties sought judicial review of that order. *City of Dallas v. CAB*, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980). The issue, however, was never resolved, because TI discontinued its Love Field service during the course of the appeal; and the case was dismissed as moot.

Continental's proposed service at Love Field is similar to the earlier service of TI approved by the CAB. The issues and positions of interested parties remain much the same as in TI's 1980 application. After careful review of comments, the plain words of the Amendment, and its legislative history, we have determined that the CAB properly interpreted subsection (c)(1) as only prohibiting interlining on flights serving Love Field. Thus, we find the Amendment does not prevent Continental from providing service between Love Field and Houston.

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[6] TI was subsequently merged into Continental after its parent, Texas Air Corporation, acquired Continental.

[7] Unlike TI, Southwest, which had previously been authorized by the CAB to provide service at Love, did not interline with other carriers elsewhere on its system. Order 79-9-192 (September 29, 1979).

[8] In addition, the CAB found that the Amendment's restrictions, while statutory and clearly applicable without further regulatory action, should be embodied in certificates authorizing such service, as intended by Congress (Conference Report at 25). Order at 6.

OPERATIONS BY AN AIR CARRIER WITH INTERLINE SERVICE

The Department interprets the Amendment as not prohibiting non-interline service at Love Field by an air carrier that provides interline service elsewhere on its system. The DFW Parties, Southwest, and Republic, who do not agree with this interpretation, contend that we should first look to the plain wording of the Amendment to ascertain Congressional intent, unless the literal wording of the statute would lead to "unreasonable" or "incongruous" results. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). We do not disagree.

In examining the wording of the Amendment, it is clear that the critical part of subsection (c) is one sentence regarding service by "an air carrier" "on a *flight* between Love Field, Texas," and points in Texas and the adjacent four states. Subclause (1) prohibits "such air carrier" from offering or providing through service or ticketing with other carriers; and subclause (2) prohibits the carrier from offering for sale transportation to a point outside the authorized area, and serving such a point on a flight that also serves Love Field. In our view, the plain and literal meaning of subsection (c) refers to a specific "flight," and subclauses (1) and (2), which must logically be read together (the clauses are joined by the conjunction "and"), describe restrictions applicable to the flight. As further discussed below, the legislative history is not contrary to this plain reading; and this reading is not unreasonable. *See, Nat'l Small Shipments Traffic Conference v. CAB*, 618 F.2d 819 (D.C. Cir. 1980).

The DFW Parties and Southwest offer a significantly different reading of the literal words of subsection (c). Their proffered meaning rests on the assumption that subclauses (1) and (2) must be read separately. Under this interpretation, subclause (1) describes a class restriction, prohibiting any carrier that interlines elsewhere on its system from serving

Love Field; while subclause (2) describes an operational restriction, prohibiting this class of carrier from serving Love Field beyond Texas and the four-state area. Thus, the DFW Parties and Southwest contend that subsection (c)(1) is clear in its terms: a carrier that conducts any interlining operations is precluded from offering interstate service at Love. Moreover, under this interpretation, any conflict between subclauses (1) and (2) is illusory; since the DFW Parties and Southwest argue that it is logical to apply subsection (c)(1) universally, while applying (c)(2) only in connection with operations at Love Field.

The Board rejected this reading of subsection (c) as unreasonable, finding that provisions of the Amendment must be read in harmony. Order 80-8-181, at 4 (August 29, 1980). As the CAB stated, to agree with this interpretation of (c)(1) would require a reading of (c)(2) prohibiting an air carrier providing service at Love from providing any service outside Texas and the four adjacent states, even operations unconnected with Love Field service. *Id.*[9] This interpretation would be inconsistent with the statements of the Conference Committee that carriers providing interstate service at Love were not precluded from operating outside the five-state area, as long as through or connecting services to points outside the area were not offered in connection with the carriers' Love Field service. Conference Report at 25-26. It is also inconsistent with the remainder of subsection (c) and the rest of the Amendment, which envisions and regulates interstate service at Love Field. Further, the Conference Report specifically states that carriers' usual ticketing, scheduling, and ratemaking practices would not be otherwise affected. Id. To read the subclauses separately effectively undercuts the Amendment, suggesting that Congress enacted a self-

[9] While this outcome might be acceptable to the DFW Parties, Southwest would probably object.

defeating statute. As the CAB found, Congress intended that carriers providing interline services elsewhere on their systems could provide service at Love Field, as long as they did not provide interline service to points outside the five-state area in connection with their Love Field services. Order 80-8-81 at 5. We agree.

Moreover, our plain reading of the Amendment is supported by a customary understanding of English grammar. To support their interpretation, the DFW Parties and Southwest would have us change the conjunction between the subclauses from "and" to "or," in order to read the clauses separately. However, the clauses are joined together in one sentence as connected restrictions on permitted interstate service at Love Field and used as descriptive modifiers of the term "flight." A contrary reading is grammatically strained and leads to unreasonable and incongruous results, as noted above.

Nor can we accept the arguments of the DFW Parties and Southwest that the CAB improperly modified the language of the Amendment by somehow reading into subclause (1) the words "on a flight" "that precede that subclause. Interestingly, in urging their own interpretation, the DFW Parties and Southwest engage in the same type of error they accuse the Board of having made. Strained modification of language is not necessary to understand the plain meaning of subsection (c); subclauses (1) and (2) must be read together in the context of the entire sentence in which they appear.

All commenters, as well as this Department, believe the Amendment's legislative history supports their reading of the plain meaning of the provision. As discussed more fully below, we find that the legislative history, when reviewed as a whole, supports our interpretation of the Amendment. This finding is consistent with the views of Continental Airlines, America West, and the Department of Justice.

The DFW Parties and Southwest contend that the legislative history embodied in the Conference Committee Report supports their position that Congress intended to preclude from Love Field service carriers conducting any interlining elsewhere on their systems, citing the Conference Report at 24. These parties discount colloquy and statements on the floor of the House and Senate by members of the Conference Committee and floor managers of the legislation indicating that the Committee intended the interlining restrictions to apply only to Love Field service. They further suggest that the Amendment should be considered in the context of "broader" history, noting that the provision of the 1978 Airline Deregulation Act defining services at satellite airports as an element of the public interest was amended to provide that this should be the case only where regional airport authorities and plans supported the use of such satellite airports. They point out that Congressman James Wright assumed this amendment of the Deregulation Act would prohibit the CAB from authorizing interstate service at Love Field. When the Board subsequently authorized Love Field service, Congressman Wright introduced an amendment to the IATCA of 1979 that would have prohibited interstate service at Love. The House adopted this amendment, but the Senate version of IATCA included no comparable provision. While the DFW Parties and Southwest do not dispute that the current version of the Love Field Amendment was a compromise agreed to in conference, they nonetheless argue that Congress intended this provision to be very restrictive.

In our view, the legislative history, properly read, supports a less restrictive interpretation of the interline provision. The Conference Report begins by stating: "Section 29 as approved by the conferees embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field." Conference Report at 24. In addition, Congress clearly knew the extent of interlining practices among air carriers, since the Airline Deregulation

Act and IATCA itself (specifically sections 11, 14 and 15) contain provisions involving agreements and fares;[10] and the Report is clear that usual ticketing, scheduling, and ratemaking practices would not be otherwise affected, beyond the specific Love Field restrictions. Conference Report at 26.

The Conference Report continues: "Subsection c permits turnaround service between Love Field and points in the four contiguous states." The turnaround nature of the authorized flights is repeated in the next paragraph. The DFW Parties' and Southwest's analysis of legislative history focuses almost entirely on the following paragraph. While those parties contend that that paragraph indicates that carriers who interline anywhere on their systems are barred from serving Love Field, the paragraph, in fact, is merely a repetition of the words of the Love Field Amendment. The Conference Committee more fully explained the meaning of that language in the next paragraph – an explanatory paragraph the DFW Parties and Southwest have apparently ignored. That paragraph begins: "Thus, a carrier providing service from Love Field to a point in one of these states is not forbidden from providing service from that point to other points in other states beyond . . . ." The Conference Report continues: "While it could not sell through tickets . . . between Love Field and points beyond the contiguous states, its usual ticketing, scheduling and ratemaking practices would not be otherwise affected." Since Congress knew that these enumerated practices constituted interlining, it is not

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[10] The DFW Parties and Southwest assert that the Amendment takes precedence over, and need not be harmonized with, IATCA and the earlier Deregulation Act. Even if this is so, it is not reasonable to assume that Congress would have adopted the Amendment with the purpose of granting a carrier (Southwest) a de facto monopoly position at Love Field after having enacted prior legislation with the primary purpose of placing greater reliance on competitive and market forces to protect the public interest.

reasonable to argue that Congress intended to bar air carriers who interline elsewhere on their systems from serving Love Field.

The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states. As a result, subclauses (1) and (2) are not properly read as class and operational restrictions, respectively. Rather, these subclauses simply specify interline and on-line restrictions applicable to service at Love Field.

Moreover, statements of Congressman Anderson of California and Senator Cannon of Nevada also support this interpretation of the Amendment. Each was a member of the Conference Committee, and each was the floor manager of the bill reported out of the Conference Committee. The views of Conference Committee members and floor managers are entitled to greater weight than that usually afforded the views of individual legislators, especially where such expressed views are consistent with other elements of the legislative history. *Train v. Colorado Public Interest Group,* 426 U.S. 1, 14 (1976). The DFW Parties and Southwest rely on the statements of Congressman Wright in support of the House version of the bill, rather than those of Congressman Anderson and Senator Cannon in support of the Committee version; however, Congressman Wright was not a member of the Conference Committee, the bill reported by that Committee was not the House version he had sponsored, and both the House and Senate accepted the compromise provision reported out by the Conference Committee.

On the floor of the House, Congressman Anderson, explaining the Amendment, said: "The prohibition in section 29(c)(1), against an air carrier providing through service or ticketing with another air carrier . . . only applies with respect to a carrier's Love Field service . . . ." 126 Cong. Rec. H. 520 (February 4, 1980). In a colloquy on the Senate floor,

Senator Cannon expressed the same understanding. 126 Cong. Rec. S. 952 (February 5, 1980). The legislative history, taken as a whole, supports our view that the intent of Congress in the Love Field Amendment was to limit interstate service at that airport to short-haul, turnaround flights, not to prohibit carriers offering interline services elsewhere from serving Love Field. The floor debates likewise indicate that operations not touching Love Field were not to be included within the prohibitions of the Amendment.

In sum, the Department believes that the plain wording of the Amendment and the legislative history, including the Conference Report and relevant statements by the Amendment's floor managers, show that our less restrictive interpretation of the Amendment is correct. Thus, we find that Continental may serve Houston from Love Field, although the carrier provides interline services elsewhere on its system. This conclusion is supported by the comments of various parties, including the Justice Department, American West, and Air Midwest. The arguments of the DFW parties and Southwest to the contrary are not persuasive. Further, since we find that Continental may serve Love Field consistent with restrictions of the Amendment, we have determined that it is not necessary to address Continental's additional argument that the amendment may violate the equal protection clause.

Finally, Republic argues that permitting Continental to serve Love Field is unfair in a competitive sense, since our interpretation of the Amendment benefits those carriers who maintain hubs in Texas and the four contiguous states to the exclusion of those who do not. Republic's argument is not convincing. Republic is free to establish its hubs wherever it chooses. There is nothing competitively unfair to Republic in our interpretation of the Love Field Amendment as drafted and intended by Congress.

MARKETING RESTRICTIONS

Continental raised four questions in its comments regarding marketing problems faced by carriers serving Love Field. The statements attached to its comments are a vivid demonstration of the confusion present today in Love Field service. Continental first asks: 1) whether a passenger may buy two tickets (so-called "double ticketing") at Love Field, one for service from Love Field to a point within Texas or the four adjacent states, and a separate, second ticket for service from that destination to a beyond point; and 2) whether the second ticket may be for the carrier's most efficient connecting flight. The answer to both questions is yes. To hold otherwise would be unreasonable and beyond that needed to effectuate the Amendment's restrictions. *See,* CAB Order 80-12-102 (December 18, 1980).

The language of the Amendment and is legislative history indicate that Congress had two concerns in restricting service to Love Field. First, Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area. Conference Report at 25. However, Congress did not intend to preclude a carrier from operating flights from a destination point served from Love Field to a point outside the Love Field service area. Id. at 26. Second, Congress intended to prohibit carriers from promoting, offering, or holding out service from Love Field to a point beyond the service area. Subsection (c). Conference Report at 25. Congress used the word "offer" in the Amendment itself; although the legislative history refers to "holding out." In some contexts, the terms "offer" and "hold out" can be used interchangeably. *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956); *Cf. Grajewski v. Commissioner*, 723 F2d 1062, (2d Cir. 1983).

"Through service" and ticketing specifically refer to the provision of transportation between an ultimate origin and destination on a single ticket for a single sum fare. *Cf. Tariff*

Flexibility Rulemaking ER-1246, Order 81-81-58 (November 10, 1981). *See also, Visit USA/Export/Inland Contract Rate Investigation (VUSA Investigation),* Order 84-8-55 at 26 (August 10, 1984). The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights. The key concept is that it is sold by the carrier, and perceived by the passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract.[11] Through service provides certain conveniences for the passengers. For example, the passenger need not reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.

In contrast, double ticketing involves the use of two tickets (hence, two contracts of carriage), the payment of two separate fares, and requires the passenger to forego the service conveniences associated with through ticketing. Although Congress prohibited through service and fares at Love Field, it intended that a carrier's "usual ticketing, scheduling and ratemaking practices would not be otherwise affected." Conference Report at 26. Such "other" practices may include double ticketing. *Cf. Interstate and Intrastate Fares in California Markets*, 71 CAB 23 (1976).

The language of the Amendment makes clear that a carrier cannot advertise, promote, or otherwise affirmatively solicit double-ticketing passengers. The question, then, is whether the sale of double-ticketed service at the unsolicited request of a customer amounts to an offer or holding out. Such a sale is not necessarily an offer. An offer is a proposal to sell a

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[11] In the case of connecting flight service, the amount of the fare may be calculated by simply adding the local fares on individual flight segments, or it may be a different, usually lower, fare reflecting costs or competitive considerations. The key concept, again, is that the fare is stated as a single amount. *Cf. VUSA Investigation*, Order 84-8-55 at 27.

ticket or provide transportation. *Frissell v. Nichols,* 94 Fla. 403, 114 So. 431,433 (1927); *Cf. Daitom, Inc. v. Pennwalt Corporation* 741 F2d 1569 (10th Cir. 1984). If a carrier simply responds to a customer's unsolicited request, it has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer, although the carrier's acceptance results in a contract. Congress prohibited carriers from "offering for sale . . . transportation to or from . . . any point which is outside [the Love Field Service area]"; but neither the wording nor the legislative history prohibits carriers from selling, or passengers from purchasing, transportation to points outside the Love Field service area. While the Amendment prohibits single-plane flights, interline service, through service and ticketing, and advertising and promotion of service outside the Love Field service area, it does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service. Thus, to prohibit double ticketing or the sale of a carrier's most convenient flight from a destination in the Love Field authorized service area to a beyond point exceeds what is necessary to prohibit through service and ticketing from Love Field.

Continental's second question, also asked by Delta, is whether a carrier may display in a computer reservations system under "connections" service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question. It says that "carriers may not hold out, offer or advertise Love Field service to or from points beyond the four contiguous states in any respect, including the publication of connecting flight schedules in airline guides, flight schedules, or similar media." Conference Report at 25. The ban on advertising of service from Love Field beyond Texas and the four contiguous states is clearly envisioned by the Amendment.

The phrase "airline guides, flight schedules, or similar media" includes computer reservations systems. These systems were used at the time of the Amendment's passage and not specifically excluded.

Continental's third, related marketing question is whether a carrier may advertise connecting service and display connecting service, as such, in its flight schedules. Again, the answer is no. Unsolicited information furnished to the public in any form is a means of offering or holding out, which is prohibited. *See, e.g., Red Ball Transit Co. v. Marshall* 8 F2d 321,323 (S.D. Ohio 1925). Moreover, as discussed above, Congress clearly contemplated prohibiting publication of such flights in individual carrier schedules, as well as industry information media.

Continental's fourth question concerns the marketing of fares and their construction. Continental asks whether a fare could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field to a point in the authorized area, plus that point to a point outside the service fare.) This practice would clearly involve the offer of a through fare, since it could not be considered as anything but a single sum fare. Moreover, it could not be offered as anything but a single contract of carriage, *i.e.,* a single through ticket. This is different from the double-ticketing situation, discussed above, which involves two separate contracts of carriage. The Conference Committee Report states that ". . . a carrier could not . . . offer through fares between Love Field and points beyond the contiguous States . . ." Conference Report at 26. Therefore, a carrier cannot offer a constructed fare for double-ticketed service originating or terminating at Love Field.

Throughout this discussion on marketing, we have used the term "carrier" to include travel agents or other persons or methods used by the carrier to sell its tickets and services.

Whenever an agent is acting for a principal, the same restrictions applied to the principal apply to the agent.

SMALL AIRCRAFT OPERATIONS

In connection with its computer reservations system, Delta asks whether a certificated carrier using small aircraft should be treated the same as a commuter carrier serving Love Field. The Amendment specifically authorizes interstate air transportation at Love by commuter airlines using aircraft of 56 seats or less. The term "commuter airline" is not defined elsewhere in the Amendment. The Amendment's language must, therefore, stand on its own. Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative.[12] Thus, we find that operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations.

INTRASTATE OPERATIONS

We also asked for comments on whether the Amendment applies to intrastate service within Texas. The Amendment is somewhat ambiguous on this question. Subsections (a) and (b), by their terms, apply only to flights form love Field to "points outside the State of Texas." Subsection (c), however states that subsections (a) and (b) do not apply to, and under certain conditions carriers may provide, fights between Love Field and "points within the State(s) of . . . Texas." The Conference Report states that the "provisions do not affect . . . intrastate service in Texas." Conference Report at 25. Thus, we conclude that the Amendment does not apply to

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[12] The Department has taken this approach to all aspects of economic regulation of commuter air carriers. 14 C.F.R. 298.90.

service by an intrastate carrier or to service carrying only intrastate passengers by an air carrier.

The more difficult issue, however, is the application of the Amendment to air carriers providing both intrastate and interstate service on the same flight. The CAB faced this question in Order 80-8-181. It decided that carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area. The Department believes the CAB was substantially correct. In our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate service from Love Field on the same flight without violating the Amendment's restrictions. However, the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

ACCORDINGLY,

1. Continental or its agents may provide service from Love Field, Dallas, Texas, to Houston, Texas;

2. Continental or its agents may sell a ticket form an authorized destination of a flight from Love Field to a point beyond that destination, if demanded by a passenger, separately from the ticket for the Love Field flight, provided the amount of the tickets equals the sum of local fares;

3. Continental or its agents may not by any means whatsoever list or advertise "connecting" flights for an authorized Love Field flight to a point beyond the Love Field service area, including listings in a computer reservation system;

4. Delta may list in its computer reservation system service by certificated air carriers that use aircraft of 56 seats or less

serving Love Field in a manner similar to listings for commuter air carriers; and

5. The Amendment does not apply to service by intrastate carriers or intrastate service by an air carrier certificated under the Act.

By:

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Assistant Secretary for Policy
and International Affairs

(SEAL)

MOTION FILED

MAY 3 1 2000

Nos. 99-1739 and 99-1745

IN THE

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Petitioner,

- and -

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Airports Council International – North America ("ACI-NA") hereby moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file a brief as amicus curiae in support of the petitions ("Petitions") for writ of certiorari, Nos. 99-1739 and 99-1745, to the United States Court of Appeals for the Fifth Circuit.

ACI-NA's members are the state, local and regional governing entities that own and operate commercial service airports in the United States and Canada. ACI-NA member airports serve more than 97 percent of the U.S. domestic scheduled air passenger and cargo traffic, and virtually all U.S. scheduled international air travel. Those members are directly impacted by the issues raised in the Petitions pertaining to the scope of federal preemption of the proprietary powers of airport owners and operators and thus ACI-NA is uniquely positioned to address those impacts and to aid the Court in considering the Petitions.

ACI-NA supports the Petitions, which seek review of a Fifth Circuit decision ("Decision") entered February 1, 2000, entitled *Dallas-Fort Worth International Airport et al. v. Department of Transportation* and reported at 202 F.3d 788 (5th Cir. 2000). That Decision wrongly concluded that the Airline Deregulation Act, currently codified at 49 U.S.C. § 41710 *et seq.* ("Deregulation Act"), preempted a contract, called a "use agreement," between the Dallas-Fort Worth International Airport Board, which owns and operates DFW International Airport, and a commercial airline, American Airlines, which provides service at DFW International Airport. The use agreement sets forth agreed-upon terms and conditions — including the space the airline was allowed to occupy exclusively and the rent charged for that space — under which the airline was entitled to use the airport's

facilities. The Fifth Circuit mistakenly concluded that a provision in the use agreement, by which American Airlines agreed to base certain interstate flights at DFW International Airport and not at nearby Love Field, was preempted since it had the effect of a local rule or regulation relating to "routes or services" which the Fifth Circuit decided was preempted by the Deregulation Act.

The Fifth Circuit's Decision contradicts earlier court decisions recognizing the validity of local political entities exercising, as airport owners and operators, proprietary powers to allocate efficiently the use of airport facilities, even where the exercise of such power impacts "routes or services." The Decision also contradicts this Court's reasoning in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). In *Wolens*, this Court concluded that an airline contract, freely entered into by the airline, which impacted "routes or services," was not preempted by the Deregulation Act.

ACI-NA believes the Decision merits review by the Court because the Decision would potentially harm most of the nation's commercial service airports, threatening the ability of airports to exercise their proprietary powers and to rely upon existing use agreements with airlines. It is through such contracts that airport proprietors efficiently allocate the use of their facilities among airlines. Moreover, the commitments set forth in such contracts aid airport proprietors in financing improvements of their facilities. Given the obvious importance of use agreements to the nation's airports, ACI-NA believes it can assist the Court in addressing the question of federal preemption of such use agreements.

It is respectfully requested, therefore, that the Court grant leave to ACI-NA to file the attached amicus curiae brief in support of the Petitions.

Respectfully submitted,

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QUESTION PRESENTED

Did the Fifth Circuit wrongly decide that the DFW International Airport's use agreement with American Airlines was preempted by the Airline Deregulation Act ("Deregulation Act"), currently codified at 49 U.S.C. §§ 41710 *et seq.*

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INTEREST OF THE *AMICUS CURIAE*

Airports Council International – North America's ("ACI-NA") members are the state, local and regional governing entities that own and operate commercial service airports in the United States and Canada.[1] ACI-NA member airports serve more than 97 percent of the U.S. domestic scheduled air passenger and cargo traffic, and essentially all U.S. scheduled international air travel. On February 1, 2000, the United States Court of Appeals for the Fifth Circuit issued a decision ("Decision"), reported as *Dallas-Forth Worth International Airport, et al. v. Department of Transportation*, 202 F.3d 788 (5th Cir., Feb. 1, 2000), which threatens to undermine the ability of airport proprietors to rely on use agreements between airport proprietors and signatory airlines. Use agreements govern the terms and conditions of the signatory airlines' use of airport facilities and are a key mechanism by which an airport proprietor allocates the limited resources of the nation's airports. Given the threat posed by the Decision to the legitimate proprietary use of such agreements, ACI-NA is well positioned to provide the Court with the perspective of the nation's airport proprietors,

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1. Pursuant to Supreme Court Rule 37.6, ACI-NA states that no counsel for any party authored these papers in whole or in part and that no person or entity, other than ACI-NA, its members and its counsel, contributed monetarily to the preparation and submission of these papers.

ACI-NA has requested, pursuant to Supreme Court Rule 37.2, the consent of all parties to ACI-NA's request to file an amicus curiae brief. As of the date of this filing, the United States Department of Justice, the City of Fort Worth, the City of San Francisco, the Dallas-Fort Worth International Airport Board, Legend Airlines, Southwest Airlines and American Airlines have granted such consent.

aiding the Court by explaining both the role of those use agreements at the nation's airports and the potential impact of undermining those agreements.

SUMMARY OF ACI-NA'S POSITION

Petitions Nos. 99-1739 and 99-1745 should be granted because the United States Court of Appeals for the Fifth Circuit decided an important question of federal law in a way that conflicts with a relevant decision of this Court. *See* Rule 10 of the Supreme Court of the United States. Specifically, the Fifth Circuit's Decision conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). In *Wolens*, the Court concluded that a contract between American Airlines and passengers which related to "routes and services" was not preempted by the Deregulation Act, since the terms of the contract were the result of free bargaining. The Fifth Circuit decision eviscerates *Wolens* by concluding that the Deregulation Act does preempt a contract between American Airlines and the Dallas-Fort Worth International Airport Board pursuant to which American Airlines agreed to offer certain interstate service at DFW International Airport and not at nearby Love Field.[2]

The potential harm from the Decision is substantial. The Decision threatens to undercut airport proprietors' abilities to exercise their proprietary power to operate their airports effectively and efficiently. It is pursuant to such proprietary power that almost every airport in the nation has in place "use agreements" which set forth the terms and conditions of the service provided by signatory airlines using the

2. This provision has been included in DFW International Airport's use agreements since the airport opened.

airport's facilities. Historically, Congress has recognized the need for such power to reside with airport proprietors. Indeed, in the Deregulation Act itself, Congress expressly declared that the Deregulation Act was not intended to preempt a state or local government's exercise of its powers as an airport owner and operator. Despite that clear statement of Congressional intent, the Fifth Circuit has now called into question, by misinterpreting the Deregulation Act in contravention of this Court's decision in *Wolens* and earlier case law, the continued ability of airport proprietors to allocate, through contract, airport facilities among potential users and rely upon the commitments in such contracts.[3]

ARGUMENT

In balancing the interests of the federal government in regulating the nation's air transport system against the rights of the owners and operators of the nation's airports, Congress has repeatedly recognized that airport proprietors have the continuing authority to manage the facilities they make available for air transportation. Thus, the Deregulation Act declares, in pertinent part, that:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a

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3. ACI-NA notes that it is concerned here with the Fifth Circuit's interpretation of the scope of the Deregulation Act as applied to use agreements, and not to the *Shelby* or *Wright* amendments impact on air carrier service at Love Field, discussed at length in the pending petitions for writ of certiorari.

> price, route, or service of an air carrier. . . . 49 U.S.C. § 41713(b).

However, the Deregulation Act then immediately qualifies that ban by stating that the preemption provision "does not limit a state [or] political subdivision . . . that owns or operates an airport served by an air carrier . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3).

Here, the Fifth Circuit essentially ignored the limiting provision set forth in Section 41713(b)(3), concluding that the Dallas-Fort Worth International Airport Board's use agreement with American Airlines was preempted because it had the force or effect of an invalid local regulation relating to "routes and services" in violation of the Deregulation Act. In particular, the Fifth Circuit found invalid the following provision of the use agreement:

> Airline agrees that it shall conduct its certificated air carrier services serving the Dallas/Fort Worth area to, from and at the Airport, to the extend required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.

This provision essentially required American Airlines, in exchange for benefits contained in the use agreement, to base its interstate service for the Dallas/Fort Worth area at DFW International Airport.[4]

4. Not all airlines operating at DFW International Airport choose to avail themselves of the various benefits and obligations of being a signatory to a use agreement. Thus, at least one such airline has historically chosen not to contract away its ability to (Cont'd)

The provision clearly has a reasonable and rational basis: it assured the viability and maximum utilization of DFW International Airport, and it provided for the efficient distribution of Dallas/Forth Worth area flights between the new DFW International Airport and the smaller Love Field. Yet, instead of deferring to the airport owner's exercise of its proprietary power to enter into such use agreements, the Fifth Circuit concluded that a contractual limit on American Airlines' ability to base interstate flights at Love Field constituted an invalid local regulation relating to "routes and services" in violation of the Deregulation Act. That conclusion squarely contradicts this Court's decision in *Wolens*. In *Wolens*, the Court concluded that a contract freely entered into by an airline, even through it related to "price, route or services," was not federally preempted by the Deregulation Act because the contract was a "privately ordered obligation[ ]" which "did not amount to a state's enactment or enforcement [of] any law." *Wolens*, 513 U.S. at pp. 228-229.

The Fifth Circuit attempted to distinguish *Wolens* in two ways. First, the Court noted that the contracting parties in *Wolens* were private parties, while the Dallas-Fort Worth International Airport Board is a public entity. Second, the Fifth Circuit argued that this Court, in *Wolens*, based its decision on the fact that "market efficiency requires effective means to enforce private agreements" while the use agreement at DFW International Airport did not serve the purpose of market efficiency since it "seems" to have been entered into "to implement an agreement between the cities

(Cont'd)
operate interstate flights both from DFW International Airport and nearby Love Field. Correspondingly, that airline does not enjoy the benefits of being a signatory airline at DFW International Airport.

to regulate airport use in the Dallas-Fort Worth area." *Dallas-Fort Worth*, 202 F.3d at p. 811.

Neither argument is compelling. The fact that the Dallas-Fort Worth International Airport Board is a public entity does not lessen the validity of its contracts under the Deregulation Act. If anything, the Deregulation Act's specific reservation of proprietary powers to a state or local entity which owns and operates an airport is an express declaration that federal law is not intended to preempt a local public entity, such as the Dallas-Fort Worth International Airport Board, which owns and operates the airport, from entering into contracts pertaining to the use of its facilities. This is especially true where the purpose underlying the contractual provision, enhancing the financial viability of the airport, is clearly a legitimate goal of the airport proprietor. The Fifth Circuit's "market efficiency" analysis is even less compelling. In *Wolens*, this Court explained:

> The stability and efficiency of the market depend fundamentally on the enforcement of agreements, freely made, based on needs perceived by the contracting parties at the time.

Wolens, 513 U.S. at p. 824. It is that very stability and efficiency which is at issue here. Not every airline which uses DFW International Airport, or indeed any airport, is necessarily a signatory to a use agreement. By signing a use agreement an airline obtains certain benefits and certain obligations it would otherwise not possess. In return, an airport proprietor incurs certain obligations and benefits. One such benefit to an airport proprietor has historically been the ability to rely on the terms of its use agreements when the airport seeks financing for airport improvement projects.

Undercutting the enforcement of such contracts, as surely the Fifth Circuit has done, undercuts the airport proprietor's ability to rely on the terms of its use agreements and maximize the benefits conferred by those agreements.

In attempting to avoid *Wolens*, the Fifth Circuit's decision also contravened the earlier federal decisions addressing the interplay between federal law and airport proprietor rights. In particular, the Second Circuit has held that, consistent with the Deregulation Act, an airport proprietor could choose which airport uses should be accommodated by which facilities within the control of the proprietor. *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 960 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (1987); *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

In *Western Air Lines*, the district court held (and the Court of Appeals agreed) that the Deregulation Act evidenced no congressional intent to bar generally an airport proprietor from decisions as to which of a number of airports within a single market would be available to which user groups. *Western Air Lines*, 658 F. Supp. at 957-958; 817 F.2d at p. 226. Only in the case of a regulation that has no rational basis, unfairly discriminates, or seeks to accomplish an illicit objective would the regulation be preempted. *Western Air Lines*, 658 F. Supp. at p. 958. The district court deemed it significant that the rule at issue was intended "to divert air traffic from one airport to another within the respective system . . . and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter." *Western Air Lines*, 658 F. Supp. at p. 958. In affirming, the Court of Appeals relied on the district court's conclusion that:

> A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager . . . and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest.

Western Air Lines, 817 F.2d at p. 226, citing 658 F. Supp. at p. 957.

In examining exercises of local authority based on traditional judgments about how facilities should be used, and which users should be provided access to particular facilities, the applicable test to be applied affords to the airport proprietor substantial discretion. As stated by *Western Air Lines*:

> A "decision" by the legislature should be upheld unless [the court] can say that it is wide of any reasonable mark.

Western Airlines, 658 F. Supp. at p. 960 (quoting Justice Holmes' dissent in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928)). The Fifth Circuit's decision here accorded no such deference to the airport proprietor's judgment as to the appropriate allocation of services and resulting airport facilities in the Dallas/Forth Worth area. It was the allocation of just such resources which the *Western Air Lines* court recognized as a valid core interest of an airport proprietor. *Western Air Lines*, 658 F. Supp. at 952.

CONCLUSION

Based on the foregoing, ACI-NA requests that the Petitions be granted.

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In The

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF CROSS-PETITIONER DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD

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REPLY BRIEF OF CROSS-PETITIONER DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD

The Cross-Petition filed by the Dallas-Fort Worth International Airport Board presented two questions. The first question – whether DFW's use agreements are enforceable – was opposed by the Department of Transportation and American Airlines, Inc. The second question – whether DOT's interpretation of the Wright Amendment conflicts with a holding of the D.C. Circuit – was opposed by DOT and by Continental Express, Inc. This brief replies to all briefs in opposition to DFW's Cross-Petition.

For convenient reference, DFW Airport has restated the question at issue immediately preceding its reply discussion on that issue.

Question One

DFW Airport – like most airports – enters into bargained-for, comprehensive "use agreements" with airlines using its facilities. In exchange for long-term terminal leases, reduced lease rates, and fuel and landing-fee discounts, the signatory airlines agree to serve the Dallas/Fort Worth area exclusively from DFW. Under these facts:

- Does the Fifth Circuit's holding that the exclusivity provision in DFW's use agreement is preempted by the Airline Deregulation Act conflict with this Court's precedent providing that the ADA does not preempt voluntary, self-imposed contracts?
- Does one 38-word sentence in the 100-page use agreements, referring to the 1968 Bond

Ordinance passed to finance DFW's construction, convert those agreements into an attempt at local regulation of air service, thereby preempting the exclusivity provision under the Airline Deregulation Act?

DFW's Reply

Respondent DOT's brief in opposition to DFW Airport's Question One attempts to misdirect the attention of the Court. The DFW use agreements are not local laws, but contracts voluntarily entered into between certain airlines and the airport. Such contracts are not subject to ADA preemption because they are not regulatory.[1] Rather, these contracts, even though entered into by local governments, are like the proprietary local government contracts upheld by the Court in *Building & Construction Trades Council v. Associated Builders & Contractors*[2] and by the Ninth Circuit in *Associated General Contractors v. Metropolitan Water District*.[3]

As for the applicability of *American Airlines, Inc. v. Wolens*[4], DOT's notion that the airport is a local government is irrelevant because the airport was acting in its proprietary capacity. What is crucial under *Wolens* is that the use agreements create enforceable "privately ordered obligations" that preclude ADA preemption.

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[1] *See Cardinal Towing Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999).

[2] *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993).

[3] *Associated General Contractors v. Metropolitan Water District*, 159 F.3d 1178 (9th Cir. 1998).

[4] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).

DFW Airport's Question One is not – as American Airlines suggest – exclusively derivative of or dependent upon the Court's decision on the question presented in American's Petition concerning the proprietary powers and rights of local governments to allocate air traffic. Certainly it is reasonable to believe that if the Court reverses the Fifth Circuit on American's proprietary rights argument, then – under the Fifth Circuits' rationale – DFW's use agreements will be fully enforceable. The Fifth Circuit wrongly concluded that the use agreements were, in part, unenforceable because the 1968 Regional Airport Concurrent Bond Ordinance was preempted by the Airline Deregulation Act;[5] conversely, this Court's ruling that the Bond Ordinance is *not* preempted will, applying the Fifth Circuit's rationale, revive any unenforceable portions of DFW's use agreement.

But American is incorrect in suggesting that if the Court affirms the Fifth Circuit then the use agreements remain partially unenforceable. As explained in DFW Airport's Cross-Petition, even if the Bond Ordinance is preempted the mere reference to the Ordinance in the use agreement does not preempt the use agreement.[6] The text of the Bond Ordinance becomes a contract term and judicial interpretations of the Bond Ordinance's validity are irrelevant.[7]

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[5] 49 U.S.C. § 41713(b)(1); *see* FW Pet.App. 136.

[6] *See* DFW Cross-Pet. at 18-19, citing *Overton v. City of Houston*, 564 S.W.2d 400, 403 (Tex.Civ.App. – Houston [1st Dist.] 1978), writ ref'd n.r.e.

[7] *See Craddock Internat'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1107-08 (5th Cir. 1997).

Section 3.2 of DFW's use agreement requires a signatory airline to "conduct its Certificated Air Carrier Services serving the Dallas-Fort Worth area to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.[8] The incorporated terms of the Bond Ordinance effectively restrict certificated (that is, interstate) service of the signatory airlines to DFW.[9]

But Section 3.2 of the use agreement is a valid exercise of proprietary powers *even if the Bond Ordinance is not*. If one assumes, for the sake of argument, that the inclusion of Section 3.2 *and* the passage of the Bond Ordinance were both calculated to restrict passenger service from Love Field, each affects the airlines in fundamentally different ways: one is a contract, the other an ordinance. Airlines signing use agreements agreed to – knowingly assented to – the terms of the use agreement. In contrast, the signatory airlines had no role in crafting the Bond Ordinance and no power to accept or reject it – until they voluntarily embraced it as a contract term. The Bond Ordinance was (arguably) a regulation to which compliance was compelled, not voluntarily accepted. The signatory airlines willingly and with full awareness of its terms accepted Section 9.5 of the Bond Ordinance as part of the comprehensive deal they made with DFW – a deal from which every signatory airline has greatly benefitted.

This is precisely the kind of voluntary action that will not be preempted under this Court's holding in *American*

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[8] DFW Cross-Pet.App. 9.

[9] FW Pet.App. 58-59.

Airlines, Inc. v. Wolens.[10] The Court has not sanctioned preemption of "self-imposed undertakings." Section 3.2 of the use agreement can be enforced because the signatory airlines voluntarily agreed to contract terms expressed in incorporated language of the Bond Ordinance, not because of the passage of the Bond Ordinance itself.

American tells the Court that "a State" cannot save a regulation that it lacks the power to impose by making it into a contract.[11] Maybe so, but pulling language from the 1968 Bond Ordinance into the 1985 use agreement was nothing more than an attempt to define the consideration exchanged between DFW and the signatory airlines; it was not a maneuver to circumvent an ordinance that no one (not even DOT) could have foreseen was in jeopardy of preemption. For this presumably correct (but irrelevant) statement of the law, American cites *Cardinal Towing Auto Repair, Inc. v. City of Bedford* in "accord."[12] Invocation of *Cardinal Towing* is itself a curious maneuver because DFW Airport would enthusiastically welcome the same kind of analysis in this case that the Fifth Circuit employed in *Cardinal Towing*.

In *Cardinal Towing* – unlike what it did in this case – the Fifth Circuit looked to the scope of the contract for the activities it covers to determine whether the contract is forbidden regulation. DFW's use agreements exhaustively describe an array of benefits for the signatory airlines, including long-term terminal leases,

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[10] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).

[11] American Opp. 9-10.

[12] 180 F.3d 686 (5th Cir. 1999).

reduced lease rates, fuel discounts, and landing-fee discounts. As consideration for these benefits, the signatory airlines agree to maintain service at DFW to the extent required by the Bond Ordinance. The mere reference to the ordinance in one item of a 100-page comprehensive contract does not make the agreement co-extensive with the ordinance and does not transform the contract into government regulation.

American wants relief from the contractual consideration it gives in Section 3.2 based on what certainly must be a seldom-used, if not unprecedented, argument that it was in a relatively weak bargaining position. American tells the Court that is "absurd" to think that it *voluntarily* signed the use agreements. If, in truth, American made the deal with DFW involuntarily, American has certainly benefitted handsomely from coercion; many of American's competitors would enjoy such oppressive treatment. Airlines are not required to sign the use agreement to provide services at DFW, but only the signatory airlines receive the financial benefit of doing so. Nothing, except the expected benefits of the deal, compelled American and the other airlines to sign the original and the current versions of the DFW use agreement.

American concludes its opposition with the observation that the Bond Ordinance required the transfer of services from Love Field to DFW only to the extent "legally permissible."[13] Because the Fifth Circuit ruled that the Bond Ordinance is preempted – so American's argument goes – there is no enforceable obligation under Section 3.2 of DFW's use agreement.

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[13] FW Pet.App. 59.

Rather than obscuring the phrase "legally permissible" with a gloss of current events, it seems much more reasonable and reliable to find its meaning in the parenthetical phrase that immediately follows the term; what is legally permissible was that which *could then be done* "without violating presently outstanding legal commitments or covenants prohibiting such action," – that is, the phase-out. It makes little sense to believe that use of the phrase "legally permissible" was an allusion to laws that were more than ten years in the future.

Enforcement of DFW's use agreement to restrict signatory airline service to DFW is not, as American argues, based on "state laws or policies external to the agreement;" the ordinance has been expressly incorporated into the use agreement and can be understood without reference to any other language. DFW's contract with its airlines can be enforced by looking only at the use agreement provisions and their incorporated terms.

Question Two

The Fifth Circuit upheld DOT's interpretation that the Wright Amendment's commuter airlines exception allows single-ticket service from Love Field to points beyond the Love Field Service Area, *if* a first leg is flown intrastate on a 56-seat aircraft that then connects at a Texas airport for a second-leg, interstate flight. Does the Fifth Circuit's holding conflict with the D.C Circuit's view that Congress intended to keep Love Field a short-haul airport?

DFW's Reply

DOT's opposition consists entirely of the conclusory observation that its prior interpretation of the through ticketing restrictions and the D.C. Circuit's affirmance of it do not conflict with DOT's more recent interpretive proceeding and its affirmance by the Fifth Circuit.

Fifteen years ago, DOT interpreted the through ticketing provisions so that Continental Airlines:

> could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area.
>
> * * *
>
> . . . the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.[14]

In *Continental Airlines v. Department of Transportation*, the D.C. Circuit determined that the " . . . DOT's interpretation is consistent with the purpose of the Amendment to limit Love Field to short-haul services."[15]

DOT and Continental attempt to patch over the contradiction between the D.C. Circuit's affirmance of DOT's 1985 order and the Fifth Circuit's (seemingly reluctant) affirmance of DOT's 1998 interpretation by telling the Court that the 1985 Order addressed only Love Field

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[14] *Love Field Amendment Proceeding*, DOT Order 85-12-81, 1985 WL 57886 (1965); DFW Cross-Pet. 21-22; DFW Cross-Pet.App. 10-21.

[15] *Continental Air Lines v. Department of Transportation*, 843 F.2d 1444, 1454-55 (D.C. Cir. 1988).

flights made with what its calls "large jets" that are governed by subsection (c) of the Wright Amendment, rather than the aircraft equipped for fewer than 56 passengers.[16] But in 1985, as well as now, the Continental flights that take Love Field passengers from Houston to "the World" are conducted on large aircraft that are subject to the through ticketing restrictions of subsection (c).

No right-minded reason exists – and certainly none has been offered – to warrant or explain DOT's opening to "the World" an airport that it and the D.C. Circuit recognized to be a short-haul airport. Changing the size of the aircraft on the first leg of a through flight is not a factual difference that justifies DOT's flip flop or reconciles the conflict in the Circuit Court opinions.

Continental finally attempts to reconcile the conflict by arguing that between the 1985 DOT Order and the 1998 Order, Congress expressed a new intent – by passing the Shelby Amendment – to open Love Field to long-haul service.[17] But, the Shelby Amendment did not change Congress' short-haul role for Love Field. Rather, it merely modified the commuter airline exception to allow jets with 56 or fewer seats to operate under this provision. It did not change the scope of operations for large jet services. By authorizing commuter service at Love Field to jets with 56 or fewer seats, the Shelby Amendment did not change the Wright Amendment's inherent limitation

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[16] Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980); DFW Cross-Pet. 2-3.

[17] Section 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997); DFW Cross-Pet. 3.

to expanded service: fewer passengers, fewer locations, less efficiency. Nothing in the Shelby Amendment changed the Wright Amendment to permit long-haul flights with larger capacity planes; if Congress intended to do so, it failed to put its intentions into words. The Circuit Courts' conflicting interpretations of the commuter airlines exception should be resolved.

CONCLUSION

The petition for writ of certiorari should be granted.

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